No. 14-10008 ***CAPITAL CASE***

Title:	Michael Wearry, Petitioner
	v.
	Burl Cain, Warden
Docketed:	June 1, 2015
Lower Ct:	District Court of Louisiana, Livingston Parish
Case Nos.:	(01-FELN-015992)
Decision Date:	August 14,2013
Discretionary Court Decision Date:	February 27,2015

---Date---	-------Proceedings and Orders----------
May 27 2015	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 1, 2015)
Jul 27 2015	Order extending time to file response to petition to and including August 24, 2015.
Aug 24 2015	Brief of respondent Burl Cain, Warden in opposition filed.
Sep 8 2015	Reply of petitioner Michael Wearry filed. (Distributed)
Sep 10 2015	DISTRIBUTED for Conference of September 28,2015.
Sep 15 2015	Record Requested.
Oct 1 2015	Record received from District Court of Louisiana, Livingston Parish. The record is electronic.
Oct 8 2015	DISTRIBUTED for Conference of October 30, 2015.
Oct 9 2015	Rescheduled.
Oct 29 2015	DISTRIBUTED for Conference of November 13, 2015.
Nov 16 2015	DISTRIBUTED for Conference of November 24, 2015.
Nov 30 2015	DISTRIBUTED for Conference of December 4, 2015.
Dec 7 2015	DISTRIBUTED for Conference of December 11.2015.
Dec 28 2015	DISTRIBUTED for Conference of January 8, 2016.
Jan 11 2016	DISTRIBUTED for Conference of January 15, 2016.
Jan 19 2016	DISTRIBUTED for Conference of January 22, 2016.
Feb 8 2016	DISTRIBUTED for Conference of February 19, 2016.
Feb 29 2016	DISTRIBUTED for Conference of March 4, 2016.
Mar 7 2016	Petition Granted. Judgment REVERSED and case REMANDED. Opinion per curiam. (Detached Opinion). Justice Alito, with whom Justice Thomas joins, dissenting. (Detached opinion).
Apr 8 2016	MANDATE ISSUED
Apr 8 2016	JUDGMENT ISSUED

14-10008

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL WEARRY,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent.

Supreme Court, U.S.
FILED
MAY 27 2015
OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

In this Louisiana capital case, no physical evidence connects Petitioner Michael Wearry to the murder, and his conviction is based largely on the suspect testimony of jailhouse informant Sam Scott, who gave multiple inconsistent statements. Mr. Scott's brother and sister-in-law testified at Petitioner's post-conviction evidentiary hearing that Mr. Scott was with them on the night of the murder and could not have witnessed the murder.

The District Court and the Louisiana Supreme Court denied Petitioner relief after an evidentiary hearing at which Petitioner's sole trial counsel testified that he did not receive certain evidence from the State, including the medical records of one of Petitioner's co-defendants showing that he was recovering from knee surgery the night of the murder, and the attempts by another jailhouse informant to secure a deal despite the State's contention at trial that he did not do so. Trial counsel also testified that he did not conduct a thorough investigation and failed to identify and interview witnesses like Scott's brother and sister-in-law, consult with and retain experts, or effectively cross-examine law enforcement.

The questions presented are:

I. **Did the Louisiana courts err in failing to find that the State's failure to disclose exculpatory evidence violated its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), and that this failure prejudiced the defense?**

II. **Did the Louisiana courts err in failing to find that Petitioner's sole attorney provided ineffective representation at the guilt phase of trial under *Strickland v. Washington*, 466 U.S. 668 (1984)?**

Petitioner Michael Wearry respectfully requests that this Court issue a writ of certiorari to review the decision of the Louisiana Supreme Court.

PARTIES TO THE PROCEEDING IN THE COURTS BELOW

1. Michael Wearry, Plaintiff/Appellant
2. Burl Cain, Warden, Louisiana State Penitentiary

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL WEARRY,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Wearry respectfully prays that a Writ of Certiorari issue to review the judgment of the Louisiana Supreme Court entered in this case.

OPINIONS DELIVERED IN THE COURT BELOW

The final judgment and decree rendered by the Louisiana Supreme Court on February 27, 2015, denying Petitioner's writ to review the District Court's denial of post-conviction relief, as well as two dissenting opinions filed therewith, is attached as Appendix A. The August 14, 2013, *Reasons for Judgment* of the Twenty-First Judicial District Court of Livingston Parish, Louisiana, denying Petitioner's application for post-conviction relief is attached as Appendix B.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The Louisiana Supreme Court issued its denial of Petitioner's writ of review on February 27, 2015, and that ruling became final on that date. This Court has jurisdiction under 28 U.S.C. § 1257 to review this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1.

STATEMENT OF THE CASE

The public defender's opening statement was short. In the transcript, it would take up only about a page. "How many criminals," he asked, "does it take to tell the truth?" He was referring to the State of Louisiana's primary witnesses, who were jailhouse informants. What his opening statement did not mention, of course, were those things he did not know because they were withheld by the State: that medical records of one of his client's co-defendants substantially undermined the story told by the State's only purported eyewitness to the murder; that this eyewitness believed that coming forward with information, even false, about the crime would be a way out of prison; that another jailhouse informant had requested a deal in exchange for his testimony. But his opening statement also did not mention those things he could have known, easily known, if he had

only investigated: that the eyewitness had not been present at the murder scene; in fact, he was not an eyewitness at all.

How many criminals does it take for a jury to see the truth? None. It takes a prosecution who acknowledges the importance to the American criminal justice system of its obligations under *Brady v. Maryland* and turns over material exculpatory evidence to the defense, and a defense team who thoroughly investigates the case. Neither of these was present in the State of Louisiana's case against Michael Wearry.

The Crime

On April 4, 1998, Michael Wearry, then 22 years old, went with his girlfriend, Renarda Dominick, to a wedding in Baton Rouge, Louisiana. It was the night of the annual Strawberry Festival in Ponchatoula, and Mr. Wearry would have rather gone to that, but Ms. Dominick wanted to go to the wedding—she considered the groom, Jimmy Helm, a stepbrother—and so they went to the wedding, leaving at about 5:30 p.m. Mr. Wearry was uncomfortable because he did not really know anyone at the wedding but Ms. Dominick, including Jimmy and his bride, Rene, but Ms. Dominick tried to make it easier for him by introducing him to some members of her family. Still, he spent a portion of the reception outside by the car. Ms. Dominick recalled that she left the reception at 9 or 9:30 p.m., Mr. Wearry in tow. They stopped for gas and headed to her grandmother's house, where they arrived around 10:30 p.m.

Around 9:30 p.m., about the same time as Mr. Wearry was leaving the Helm wedding more than 40 miles away, the body of a teenage boy was found lying face down on the side of a gravel road in a rural area of Hammond, Louisiana. He was identified as 16-year-old Eric Walber. Earlier that evening, Mr. Walber had been delivering pizzas for the Pizza Express in his car, a red, two-door 1988 Ford Escort hatchback. He delivered the

final pizza of the night at about 8:15 p.m., and was expected later that evening at a friend's house. He never showed up. Sometime between that final delivery and 9:30 p.m., he was beaten to death. His car was found four days later behind an abandoned junior high school. The inside of the car was covered in blood.

Mr. Walber was an honor student and a football player. His death and the search for those responsible were widely reported in the print and television media. But the local authorities – the Tangipahoa Parish Sheriff's Office, which was leading the investigation, with the assistance of the Livingston Parish Sheriff's Office – were making little progress. The victim's car contained no fingerprints, fibers or DNA that connected anyone to the crime other than the victim. Although suspects were identified, no arrests were made. Mr. Wearry's name came up as a potential suspect, but he was quickly cleared after investigators learned of his alibi.

The first anniversary of Mr. Walber's death came and went, and then the second. The case had gone cold.

A Jailhouse Informant Comes Forward and an Indictment is Issued

In April 2000, an inmate at the Hunt Correctional Center contacted detectives, telling them that he wanted to discuss what he knew about three murders, including Mr. Walber's. Mr. Walber had been dead for more than two years, but the case was still in the news. The second anniversary of his death was commemorated in the local newspaper, and nationally, the case had been featured in January 2000 on *America's Most Wanted*. The inmate's name was Sam Scott and what he told detectives about Mr. Walber's death would eventually lead to the indictment, conviction and death sentence of Mr. Wearry, despite the fact that, at the time of his first statement in April 2000, Mr. Scott did not seem to actually know very much about the crime at all.

Mr. Scott gave five statements to investigators in April and May 2000. In his first statement, on April 18, he told investigators that he and Mr. Walber were good friends and that on the night he died, Mr. Walber had come looking for Mr. Scott, who was at work at the Winn-Dixie warehouse. Mr. Walber instead encountered Mr. Wearry and four other men, including Randy Hutchinson. The five men, Mr. Scott said, got into Mr. Walber's car (which Scott described variously as an Isuzu, Nissan or Honda that was green, blue, gray or black) and drove around. Mr. Scott said he saw them at about 11 p.m., while on break, and later learned from them that they had shot Mr. Walber and then run him over with his car.

In a second statement 20 minutes later, Mr. Scott said that he had not been working that night, but was with Mr. Wearry, Mr. Hutchinson, and the four others who drove around with Mr. Walber in his car (presumably, that green, blue, gray or black Isuzu, Nissan or Honda). They were smoking marijuana. The others decided to jump Mr. Walber and take his money. Mr. Walber was shot and then run over with his car. The body was left on Blahut Road.

These April 18 statements were not consistent with the evidence. Mr. Walber did not drive a green, blue, gray or black Isuzu, Nissan or Honda. He drove a small red Ford Escort. He was not shot. And his body was not found on Blahut Road, but rather Crisp Road. By the time of his fifth statement to investigators on May 1, 2000, however, Mr. Scott was no longer claiming that Mr. Walber had been shot, and he had correctly identified that the body was found on Crisp Road.

There was no physical evidence of any sort linking Mr. Wearry to the crime. Nevertheless, a Livingston Pariah grand jury indicted Mr. Wearry for the murder of Eric

Walber in June 2000. Mr. Hutchinson and two other men were also indicted. Mr. Scott was not among them.[1]

The Trial

Corbett Ourso, Jr., a public defender, was appointed to represent Mr. Wearry at trial. Mr. Ourso began his investigation less than a month before the trial began, even though it had been nine months since the indictment. This investigation included only one documented meeting with Mr. Wearry outside of court proceedings. Mr. Ourso did not investigate Sam Scott, his story, or his whereabouts on the night of Eric Walber's murder. Mr. Ourso did not consult with or engage any experts, such as a forensic pathologist who could analyze Mr. Scott's claims as to how Mr. Walber's death occurred. In fact, he did no forensic investigation at all. He also did little to no mitigation investigation. And although there were at least 50 guests at the Helm wedding, and maybe up to 150, Mr. Ourso's alibi investigation consisted of talking to Ms. Dominick, her aunt and her sister. He asked the investigator at the public defender's office to interview Jimmy and Rene Helm, but there is no documentation that the investigator ever did so.

The trial began on February 26, 2002. Mr. Ourso made a brief opening statement, telling the jury that no physical evidence connected Mr. Wearry to the crime and that the State was asking them for a conviction based on the word of criminals. He did not mention Mr. Wearry's alibi. The alibi would not come up until Mr. Ourso's cross-examination of the tenth witness to testify, although even then he did not mention the word "wedding." When it came time for Mr. Ourso to present his case, he did not have a

[1] Mr. Scott was eventually charged with manslaughter in 2005, and after a plea of no contest, was sentenced to 10 years, running concurrently with any other charges then pending and all time served since December 1997.

complete list of the wedding guests and did not call anyone to testify in support of Mr. Wearry's alibi other than Mr. Wearry's girlfriend and two of her relatives.

Because no physical evidence linked Mr. Wearry to the crime, the State's case largely hinged on the testimony of Mr. Scott, its only eyewitness to the murder, and another jailhouse informant, Eric Charles Brown.

Testimony of Sam Scott

At trial, Mr. Scott claimed that he came forward with information about the murder of Mr. Walber (and the two other murders) because of a crisis of conscience: he could not eat or sleep. He told the following story:

On April 4, 1998, Mr. Scott was shooting dice with Mr. Wearry, Randy Hutchinson, and others. When Mr. Wearry lost all of his money, he told the others he was going to rob someone. Mr. Walber was driving past, and Mr. Hutchinson ran out into the street to flag him down. Mr. Wearry and Mr. Hutchinson pulled Mr. Walber out of the car, and Mr. Hutchinson shoved him back into the cargo space of the hatchback through the passenger side door. The two men, together with Mr. Scott and two others (making five men total, plus Mr. Walber in the cargo space), then drove around, stopping at least three times to allow Mr. Hutchinson to pull Mr. Walber out of the car, beat him up for several minutes (with a stick, or his hands), and then return him to the cargo space. Once, Mr. Hutchinson crawled into the cargo space with Mr. Walber. By the time the group got to Crisp Road, Mr. Hutchinson pulled Mr. Walber out of the car for a final time. He and Mr. Wearry put him down in the road, and the driver of the Escort revved the car's engine, ran over the boy; turned around, ran him over again, and then backed over him.

Testimony of Eric Charles Brown

Eric Charles Brown testified that on April 4, 1998, he saw Mr. Wearry in a red car with a young white man and, although the man was not beaten or bloodied, when he saw the news report on Mr. Walber's death, he learned what had happened. However, he did not go to the police. He came forward only later because his sister knew the victim's sister. The State assured the jury that Mr. Brown had not asked for or received any deal in exchange for his testimony.

Verdict and Sentencing

On March 5, 2002, Mr. Wearry was convicted of the first degree murder of Eric Walber. The penalty phase of the trial began the morning of March 6, 2002. Mr. Ourso began calling witnesses for Mr. Wearry's mitigation case at 11:40 a.m. and rested at 12:20 p.m. The jury returned a sentence of death that afternoon.

Evidentiary Hearing

An evidentiary hearing was held by the Louisiana District Court in August 2012 and June 2013 on all claims raised in Mr. Wearry's post-conviction petition. Testimony at the August 2012 hearing established that the story told by Sam Scott at Mr. Wearry's trial was not only implausible, but a lie. On the night of April 4, 1998, as Mr. Walber was making his final delivery of the night and Mr. Wearry was just trying to get through the Helm wedding reception, Sam Scott was at the Ponchatoula Strawberry Festival with his brother, Lakendrick Scott.

Lakendrick Scott is Sam Scott's younger brother and a veteran of the United States Army. On April 4, 1998, he and Sam drove together to Springfield, Louisiana to a birthday party for their mother and uncle. They arrived late morning, 10 or 11 a.m., and stayed until 5 or 5:30 p.m. After they left the party, Sam drove them to his girlfriend's

house and then to the Strawberry Festival in Ponchatoula. Lakendrick testified that they arrived at the Strawberry Festival at about 6:30 or 7 p.m., and while there, met up with Doris Dantzler and other friends, including two of Mr. Wearry's co-defendants. Sam and Lakendrick left the Strawberry Festival together around 9:30 p.m., and after picking up Sam's girlfriend from the gas station at which she worked, drove around smoking marijuana until 11 p.m.

Doris Dantzler, now Dantzler-Scott (she and Lakendrick married in 2002), also testified at the evidentiary hearing. She too remembered being at the Ponchatoula Strawberry Festival on April 4, 1998, with Lakendrick and Sam, and recalled that it was their mother's birthday. That date has special meaning to Doris for another reason: it was her "first official date" with Lakendrick, her future husband. She met up with Lakendrick and Sam around 7 p.m. and they were together for 45 minutes to an hour.

Because Sam Scott was with his brother on the evening of April 4, 1998, from the time Mr. Walber made his final pizza delivery (at about 8:15 p.m.) to the time Mr. Walber's body was found (9:30 p.m.), he could not have seen Mr. Walber's murder. The statements he gave to investigators more than two years later and his testimony at trial which placed him at or around the crime scene could not have been true. The State's investigation file offers some explanation for why Mr. Scott falsely told investigators that he had witnessed Mr. Walber's murder. Although the State claimed that Mr. Scott came forward because of a crisis of conscience, police records suggest that Mr. Scott recognized that offering up information in this heavily publicized case could be a ticket out of prison. He told at least one other inmate that telling investigators something about Eric Walber's death could "help him get out of jail" and encouraged the inmate to just lie. Police records also suggest that Mr. Scott had a grudge against Mr. Wearry. In an affidavit obtained by

investigators, another inmate said that Mr. Scott told him that he did not know who committed the crime, but he was going to make sure that Mr. Wearry "got the needle" for it, because Mr. Scott felt betrayed by Mr. Wearry. These police records, which revealed Mr. Scott's motives for coming forward and falsely implicating Mr. Wearry, were not turned over to trial counsel.

Sam Scott's testimony at Mr. Wearry's trial was not only false in light of Lakendrick and Doris Scott's testimonies at the evidentiary hearing, but was also implausible and inconsistent with evidence on at least two counts: his testimony regarding Mr. Hutchinson's role in the murder and his testimony regarding the manner in which Mr. Walber had died.

First, Mr. Scott's testimony regarding Mr. Hutchinson's actions on the night of the crime was not medically feasible. On March 26, 1998, nine days before the murder, Mr. Hutchinson had surgery on his right knee – the repair of a torn patellar tendon.[2] Dr. Paul Dworak, an orthopedic surgeon, testified at the post-conviction hearing that, to a reasonable degree of medical certainty, Mr. Hutchinson could not have done what Mr. Scott said he did without rupturing the repair, and leaving Mr. Hutchinson unable to walk, which did not occur.[3] Specifically, Dr. Dworak noted that at the time of the murder, Mr. Hutchinson was not physically able to run, was not physically able to bend his knee

[2] As Dr. Paul Dworak testified, the patellar tendon connects the kneecap to the tibia bone, and if it is torn or disrupted, you would not be able to extend or straighten your leg, even to walk. The surgery Mr. Hutchinson received involved multiple sutures on the tear. Wire attaching the kneecap to the tibia was also inserted to relieve some of the pressure on the torn tendon.

[3] On May 5, 1998, Mr. Hutchinson's medical records showed that the repair was still intact. August 2012 Hearing Ex. 4, pp. DAMW002230.

90 degrees, and was not physically able to lift significant weight.[4] Mr. Hutchinson's father, Paul Richardson, also testified at the post-conviction evidentiary hearing, telling the court that Mr. Hutchinson could not walk unassisted in the days following his surgery. And yet, in Mr. Scott's tale, a 200-pound Mr. Hutchinson had managed to run out into the street to flag down Mr. Walber's car, had climbed through the passenger door of a two-door vehicle and over the back seat into the hatchback area, and had reached into the car to pull out the 190-pound teenager multiple times.

Prosecutor Charlotte Herbert testified at the evidentiary hearing that prior to the trial, she obtained Randy Hutchinson's medical records by subpoena but did not turn the records over to Mr. Wearry's defense counsel.

Second, Mr. Scott's testimony regarding how Mr. Walber had died was not medically feasible. At the post-conviction evidentiary hearing, Dr. LeRoy Riddick, an expert in forensic pathology, testified to a reasonable degree of medical certainty that, based on his injuries, Mr. Walber had not been struck by a car that had been 'revved up' and that a car had not passed over Mr. Walber more than once. The testimony of Mr. Scott, in Dr. Riddick's view, was false.

The expert testimony of Drs. Dworak and Riddick at the evidentiary hearing demonstrated the implausibility of and inaccuracies in Mr. Scott's story. The testimony of Lakendrick and Doris Scott established that Mr. Scott was lying about having witnessed the murder.

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[4] At the post-conviction evidentiary hearing, the State presented evidence from its own orthopedic surgeon, Dr. Greg Kinnaird, who testified that it would have been "possible" for Mr. Hutchinson to perform the acts described by Sam Scott, but that they would have presented risk to the repair.

Although Mr. Scott's inconsistent statements[9] and Mr. Wearry's alibi cast significant doubt on the State's theory of the case and its timeline, Mr. Ourso, the public defender appointed to represent Mr. Wearry at trial, acknowledged at the evidentiary hearing that he did not contact any experts; did not contact Lakendrick Scott or investigate the witnesses and co-defendants other than to instruct the public defender's investigator to look into their criminal backgrounds and any statements they had made; did not follow up to see what the investigator had done; and did not mention Mr. Wearry's alibi in his opening statement. He further acknowledged he had no strategic reason behind decisions he had made.

Jim Boren, a criminal defense attorney in Baton Rouge, Louisiana, testified at the evidentiary hearing as an expert in the standards of death penalty representation at the time of Mr. Wearry's trial. Mr. Boren explained that at the time of Mr. Wearry's trial, the prevailing standard in a capital case was that the attorney establish a defense team of two lawyers, a fact investigator and a mitigation specialist; develop a relationship with his client through many hours of meetings; and establish a theory of the case to discuss with the jury in opening arguments. None of these standards were met by Mr. Ourso. In addition, Mr. Boren testified that the standard of practice at the time of Mr. Wearry's trial

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[9] Mr. Scott explained his inconsistent statements at trial by saying that he had simply been lying to investigators at first. He was lying when he initially told investigators that he knew Mr. Walker; he was lying when he said he was at work the evening of the murder and had only heard about it later on. But evidence presented at the evidentiary hearing showed that his evolving statements became more and more consistent with the evidence, not because he simply stopped lying, or because his memory had improved, but because in the course of their interviews with Mr. Scott, investigators had given him the correct information. In Mr. Scott's first interview on April 18, 2000, for example, it was Detective Murphy Martin who mentioned that the crime had occurred on a gravel road. Mr. Scott later took up this information, and said that Mr. Walker had been killed "on a gravel road on Blahut." Detective Martin responded: "Sam, y'all didn't take the boy nowhere else? Because the boy was found at another place. . . . It was a gravel road, but it wasn't on Blahut Road." By the next day, Mr. Scott knew that the body had been found on Crisp Road. In a deposition taken on November 17, 2010, which was entered into evidence at the evidentiary hearing, Detective Martin acknowledged that he had given Mr. Scott material facts about the location of the crime.

required the defense to retain a forensic pathologist, even in non-capital cases. Again, this standard was not met by Mr. Ourso. Finally, Mr. Boren testified that the standard of practice at the time of Mr. Wearry's trial would have required Mr. Ourso to thoroughly investigate Mr. Wearry's alibi (including compiling a list of wedding guests and talking to each of them) and co-defendants, which Mr. Ourso did not do. Mr. Boren concluded that Mr. Ourso had failed to conduct an adequate investigation consistent with the standards and practices at the time of Mr. Wearry's trial.

On August 14, 2013, following the evidentiary hearing, the District Court denied relief and issued its Reasons for Judgment. The court first found that Mr. Ourso's representation of Mr. Wearry was not ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), stating that, although this representation was "perhaps not the best defense that could have been rendered, [it] was not so deficient as to satisfy the *Strickland* standard." Turning to Mr. Wearry's claims that the State had withheld material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the court acknowledged that the State "probably sought to have" turned over the evidence listed in Mr. Wearry's petition but nevertheless the court found that:

> [N]one of the evidence noted in the instant application may be categorized as "material" in the context of possible *Brady* violations. Further, even in the event that the fact of non-disclosure itself may be classified as a violation, none of the evidence identified, in the event that it had been effectively utilized by defense counsel at trial, produces a reasonable probability that the defendant would have been acquitted.

Appendix B, at 5.

On October 14, 2013, Mr. Wearry timely filed an application for writ of review with the Louisiana Supreme Court. The application was denied by the Louisiana Supreme Court on February 27, 2015. No reasons for the denial were issued.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO STOP THE STATE OF LOUISIANA FROM REFUSING TO COMPLY WITH ITS OBLIGATIONS UNDER BRADY V. MARYLAND.

Petitioner seeks the Court's intervention to prevent the desecration of cherished Constitutional protections in the State of Louisiana. Under the American system of justice, "[the state's] interest...in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. U.S.*, 295 U.S. 78, 88 (1935). Petitioner established at his post-conviction hearing that the State flouted this principle, withholding from the defense a trove of material, exculpatory evidence that would have been presented at anything resembling a fair trial. And yet, the District Court was unconcerned, concluding only that "insofar as the State failed to produce the evidence listed in the instant application, it probably ought to have done so." Appendix B, at 5.

Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the prosecution violates a defendant's right to due process if it fails to disclose evidence that is both material to guilt or punishment and favorable to the defendant's case. To establish a *Brady* violation, the defendant must prove that (1) the prosecution suppressed evidence; (2) the suppressed evidence was favorable to the accused; and (3) the suppressed evidence was material either to guilt or to punishment. *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995). Information that must be disclosed by the prosecution under *Brady* is not limited to physical evidence, but includes any evidence that impeaches the testimony of a witness where the reliability or credibility of the witness may be determinative of guilt or innocence. *See Giglio v. United States*, 405 U.S. 150, 154 (1972). Moreover, the duty to disclose favorable evidence is not limited to evidence in the actual possession of the prosecutor; it extends to evidence in the possession of the entire State team, including all

investigative and government agencies. *Kyles*, 514 U.S. at 437. Further, in assessing *Brady* claims, courts must look to the cumulative effect of all evidence withheld by the State. *See Kyles*, 514 U.S. at 436-43 (Because materiality is assessed "in terms of the cumulative effect of suppression," a court should consider the suppressed evidence "collectively, not item by item.").

In *Smith v. Cain*, this Court granted *certiorari* and reversed Louisiana's denial of post-conviction relief where the State withheld evidence impeaching the State's only eyewitness to the crime. *Smith v. Cain*, 132 S. Ct. 627, 630-31 (2012). Similar relief is warranted here, where the State suppressed evidence showing that Sam Scott, the State's only purported eyewitness to the murder, was lying to the jury.

A. The State Suppressed Randy Hutchinson's Medical Records.

The State suppressed all medical records relating to Randy Hutchinson's knee surgery. Evidence at the post-conviction hearing established that the prosecution had possession of the medical records, having obtained them by subpoena years before Petitioner's trial. *See* August 2012 Hearing Ex. 4, Randy Hutchinson's medical records, at p. DAMW002217. In seeking the subpoena, the State told the Court that Hutchinson's medical records were "necessary" for the ongoing investigation of Mr. Walber's murder. *Id.* The evidence at the hearing also established that the prosecution did not turn the records over to the defense. August 2012 Tr. p. 223: 26-31. As discussed above, these records are a significant piece of material exculpatory evidence, given the nature of Hutchinson's surgery, the surgery's proximity in time to the murder, and Sam Scott's description of Hutchinson's feats of strength and acrobatics the night of the murder.

At the post-conviction hearing, Assistant District Attorney Charlotte Herbert admitted that it was important for the State to know what Hutchinson's physical condition

was on April 4, 1998, given Mr. Scott's description of his activities. August 2012 Tr., p. 221: 11-27. And as set forth above, the answer was that Hutchinson's mobility was significantly limited, according to the expert testimony of orthopedic surgeon Dr. Paul Dworak: Hutchinson could not run, could not bend his knee to a 90 degree angle, and could not lift substantial weight. Dr. Dworak opined to a reasonable degree of medical certainty that Randy Hutchinson would not have been capable of engaging in the conduct described by Sam Scott.

The District Court, denying relief, concluded that Hutchinson's "medical records do not show that he could not have participated in the crime by virtue of his physical condition. To the contrary, Hutchinson's medical records indicate that he was not compliant with the limitations on physical activity prescribed by his treating physician." Appendix B, at 5. The District Court went on to say that "when viewed in the context of testimony by the State's expert, Dr. Greg Kinnet [sic] . . . the inclusion of Hutchinson's medical records as evidence . . . does not produce a reasonable probability of acquittal." *Id.* In reaching its decision, the District Court not only misapplied the *Brady* test, but also erroneously stepped in as the ultimate fact finder, usurping the role of the jury to reject Dr. Dworak's testimony in favor of the State's medical expert.

First, the District Court's conclusion that there is no viable *Brady* claim because Hutchinson *could* have participated in the crime is a misapplication of *Brady*. Indeed, the District Court offered the very same fallacious reasoning that required a reversal by this Court in *Smith v. Cain*. *See* 132 S. Ct. at 630 ("the State's argument offers a reason that the jury *could* have disbelieved [the undisclosed exculpatory evidence], but gives us no confidence that it *would* have done so") (emphasis in original). *Brady* relief is not about whether something is possible. The question is whether disclosure of the suppressed

evidence to competent counsel would have made a different result reasonably probable, *Kyles*, 514 U.S. at 441, or whether the new evidence could reasonably be taken to put the case in a different light. *Id.*, 514 U.S. at 434-35. Even if the jury had rejected Dr. Dworak's opinion that Sam Scott had described a medical impossibility, it could nevertheless have determined that Sam Scott's account was extremely unlikely. This, combined with the other factors making Scott's testimony inherently suspect, would have put the case in an entirely different light.

The jury should have heard this evidence and decided itself whether to accept or to reject Dr. Dworak's testimony, or to weigh such evidence against other expert or lay testimony. Medical evidence casting doubt on the story of the State's only purported eyewitness to the murder would have painted a very different picture for the jury, particularly in a case in which the witness's prior statements raised legitimate concerns as to whether he had witnessed the crime at all. In determining prejudice from a *Brady* violation, the inquiry does not turn on which evidence the court, in hindsight, determines the jury would have considered more important. Rather, the issue is simply whether the new evidence could reasonably be taken to put the case in a different light. *See Kyles*, 514 U.S. at 434-35.[9] That standard is satisfied here, and the District Court erred by disregarding the correct standard.

Second, the District Court erred when it analyzed the suppressed medical records "in the context of testimony by the State's expert, Dr. Greg Kinnet [sic] ...." Appendix B, at 8. The District Court did precisely what this Court has cautioned against doing: rather

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[9] Even without Dr. Dworak, the medical records combined with the testimony of the State's expert, Dr. Kinnett, would have painted a different picture for the jury, with Dr. Kinnett's admissions that each of the various activities described by Scott would have created a risk of rupturing Hutchinson's tendon repair.

than analyze whether all the suppressed material would have cast the case in a different light, the District Court focused on evidence the jury never saw and which the District Court, in hindsight, determined the jury would have considered more important. That is, the District Court speculated that a hypothetical jury seeing the medical records and hearing the testimony of Drs. Dworak and Kinnett would have rejected Dworak's testimony, credited Kinnett's testimony, and convicted Michael Wearry. *See Porter v. McCollum*, 558 U.S. 30, 43 (2009) (reversing capital sentence where, even though the state's experts challenged the petitioner's expert's methods and conclusions, "it was not reasonable to discount entirely the effect that his testimony may have had on the jury"). Petitioner seeks this Court's intervention because the Constitution guarantees a fair trial, despite judicial assurances that his conviction was guaranteed.

B. The State Suppressed Eric Charles Brown's Efforts to Get A Deal, Then Lied About it to the Jury.

The State withheld evidence impeaching its other key witness and then capitalized on its own misconduct by touting the lack of such evidence to the jury. The State's second most important witness against Petitioner was Eric Charles Brown, another jailhouse informant. Well aware of the credibility problems this posed, the State tried to stay in front of the issue, telling the jury in its opening statement, "Eric Charles Brown doesn't have no [sic] deal. He don't [sic] need one. ***He doesn't want one***, he didn't do anything." Trial Tr., p. 1723 (emphasis added). The theme of Brown's pure heart continued during direct examination, when Brown, prompted by the State with the question, "What was it about that kid that is making you come in here and tell it today?" responded, "my little sister knew his sister." *Id.* at p. 2206. The State hammered the theme home to the jury in closing:

> Eric Charles Brown told you what he saw that night. He comes in here with no deal, nothing. In fact, . . . Michael Wearry is his buddy. But even then he is still coming in. He has no deal on the table. Why else come? What did he tell you? His little sister, this boy's little sister, was nice to my little sister and that family deserves to know.

Id. at p. 2309.

There is a problem with the State's carefully orchestrated presentation of Brown as a true-hearted, noble witness ratting on a friend in order to be kind to a grieving family: it is not true. While the State was making these impassioned pleas to the jury, the State was sitting on suppressed evidence casting Brown in a radically different light. Police notes withheld by the State show that when Mr. Brown first came forward, he did not mention his little sister. He did, however, mention that he wanted favorable treatment on charges against him in exchange for the information:

> Eric [Brown] asked what this was about. I told him it was about the killing of the pizza boy. He started telling us he knew nothing. I then told him who we had in custody. He then said I didn't kill anyone. I told him we knew he wasn't involved in the killing but if he saw something he should tell us. He said he didn't need any more charges. I told him if he wasn't involved he might not have any more charges. ***He asked if he told what he knew would we not charge him and would we help with the sentence he already had. We told him we couldn't promise him anything but we would talk to D.A. if he told the truth.***

August 2012 Hearing Ex. 13, at p. DAMW000191 (emphasis added). There is more. Brown, through counsel, directly asked the District Attorney for a deal. On June 8, 2000, Brown's attorney, Mike Nunnery, wrote to District Attorney Scott Perrilloux on Brown's behalf:

> [P]lease give serious consideration to dropping the severed possession charges against him. The totality of the circumstances are such that justice would require that the possession charge be dropped.

August 2012 Hearing Ex. 13, at p. LPSO000798. This request came mere months after Mr. Brown first spoke to police about the Walber murder (and asked for a deal), and before Mr. Brown testified at Mr. Wearry's trial. It is undisputed that these documents were withheld from the defense.

The District Court cast this claim aside, stating that "there is no evidence to suggest that Brown was actually able to obtain any benefit or any assurance of a possibility thereof prior to testifying at trial." Appendix B, at 6. Whether there is proof that Brown actually obtained favorable treatment is beside the point. The suppressed documents directly contradict what the State told the jury, that not only did Eric Charles Brown not have a deal, he did not want or ask for one, and that he came forward out of altruism. Under these circumstances, the jury should hear evidence showing a desire to get a deal, even where a formal deal is never reached. *See Napue v. Illinois*, 360 U.S. 264, 270 (1959) (noting that the key question is not whether the prosecutor and the witness entered into an effective agreement, but whether the witness "might have believed that [the state] was in a position to implement...any promise of consideration.")

Here there is no question that the suppressed evidence was inconsistent with both Brown's testimony and with the State's repeated assurances to the jury that Brown's motives were pure. The District Court simply disregarded the possibility—factually supported in this case and legally supported in the case law—that Brown's requests for a deal and the State's vague assurances could have colored the jury's view of Brown and his testimony. Of course such information was important to evaluating Brown's credibility, or

the State would not have told the jury at least twice that Brown hadn't asked for a deal,[7] much less elicited, then retold, the story about Brown's little sister.

The District Court's ruling on this particular issue gives prosecutors a perverse incentive. Despite noting that "as a matter of policy, it is better to err on the side of disclosure," Appendix B, at 5, the District Court not only condoned the suppression of this exculpatory evidence, but gave cover to the prosecution, ***which benefited from its own bad conduct by crafting and presenting a trial theme (the sweet tale of Eric Charles Brown's little sister) belied by the suppressed evidence.*** Why should the prosecution *ever* disclose exculpatory evidence that might interfere with its trial narrative? Why indeed, when the District Court will simply content itself with noting the omission and holding that this, like every other bit of suppressed evidence, would not have made any difference to the jury? That is not the correct standard and courts should not be permitted to adopt it as the standard.

Here, the State argued in its opening statement, through its presentation of evidence, and in closing arguments, that Brown had no ulterior motive and no reason to lie. The State thus acknowledged that the jury's estimation of Brown's truthfulness could be determinative of guilt or innocence. The State cannot now be permitted to claim that the suppressed evidence was not material. The suppression of this evidance, alone or cumulatively with the other suppressed evidence described in this Petition, requires a reversal of the District Court's denial of post-conviction relief. *See* Kyles, 514 U.S. at 436-437.

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[7] The State told the jury in its opening statement that Brown "doesn't want" a deal and even though he was "doing 15 years on a drug charge right now, hasn't asked for a thing." Trial Tr., p. 1723.

C. The State Suppressed Evidence Inconsistent with Sam Scott's Purported Pure Motives in Coming Forward.

The District Court ignored a similar category of *Brady* evidence, this time involving prior statements by the State's key witness, Sam Scott. At the evidentiary hearing, trial counsel Corbett Ourso confirmed that he never received a number of additional documents that undermined Scott's credibility and put the lie to the State's theory that Scott came forward to testify because of a nagging conscience.

These suppressed documents included a police report relating to one of Scott's fellow inmates, Kedrick Johnson, in which Johnson claimed to have witnessed the murder. August 2012 Hearing Ex. 13, at p. DAMW000197. Johnson later recanted, however, telling detectives that "he had lied . . . . He hadn't heard anything." August 2012 Hearing Ex. 13, at p. DAMW000175. He had come forward because Sam Scott "told him it would help him get out of jail." *Id.* The implication to this interaction is that if Scott told Kedrick Johnson that lying about the Walber murder would help Johnson get out of jail, then Scott thought that his doing so would get him out of jail as well.

Also suppressed was evidence concerning another of Scott's fellow inmates, Reggie Jackson, who offered investigators the reason for Scott's testimony against Petitioner: self-protection and animus. According to Jackson, Scott said: "[M]an, I'm caught up in the middle of this bullshit they're trying to get me to take the stand. They are trying to give me 10 years, at first I wasn't charged with nothing now if I don't testify I'm going to have to take the charge. . . . Now they keep trying to give me the charge and I got to do what I got to do." August 2012 Hearing Ex. 13, at pp. DAMW001886-88. Jackson had still more to tell. In an affidavit, he swore that Scott said "I'm gonna make sure Mike gets the needle cause he jacked over me." *Id.* Both the tenor and content of these withheld

documents flatly contradict the State's portrait of Scott as the noble reformed criminal, whose conscience would not allow him to remain silent, even though he knew that his testimony would result in more prison time. Scott's statements to Jackson showed that he was testifying only so that he would not have to take the charge in the murder and that Petitioner was a deserving fall guy.

As with Eric Brown, the State attempted to overcome the credibility problems that come with reliance on jailhouse snitch testimony by trumpeting Scott's pure motives. And again as with Brown, the State simply kept the lid on any evidence that did not fit the theme. At trial, the State convinced the jury that Scott was a guilt-ridden truth-teller, a reformed offender who had the courage to speak the truth, even at the cost of his own freedom. The withheld statements of Kedrick Johnson and Reggie Jackson paint a different picture of Scott, one of a savvy manipulator who knows how to work the system, who knew that blaming Petitioner "could help him get out of jail," and who held enough of a grudge after being "jacked over" that he would do or say anything to "make sure Mike gets the needle." The defense should have had this important evidence and the opportunity to correct the jury's misconception about the State's key witness.

In sum, the State presented two purported witnesses to Petitioner's participation in the crime for which he was convicted. Both are criminals of questionable credibility and shadowy motives. The State aggressively undertook efforts to convince the jury of their pure hearts and unselfish motives, and, by extension, their trustworthiness, while at the same time, suppressing any evidence to the contrary. Given the centrality of Brown and Scott to the State's case, evidence undermining their credibility was material and exculpatory, and should have been turned over to the defense and presented to the jury. Because it was not, Petitioner should be granted relief.

D. The State Withheld a Material Prior Inconsistent Statement by its Rebuttal Witness, Rene Helm.

The State also improperly suppressed evidence that supported Petitioner's alibi. The State never disputed that Petitioner and his girlfriend, Renarda Dominick, attended the Helm wedding reception, which began no earlier than 6:00 p.m. on the night of April 4, 1998. Of the 100 or so guests at the reception, the State did not identify a single person who claimed to have seen Petitioner and Ms. Dominick leave the reception in time for Petitioner to make it to the crime scene before Mr. Walber's body was discovered.

The only wedding guest put on by the State to rebut Petitioner's alibi was the bride, Rene Helm, who testified that she and her husband were the last to leave the reception between 8:30 p.m. and 8:45 p.m. *State of La. v. Michael Wearry*, 931 So. 2d 297, 309 (La. 2006). The State specifically asked Ms. Helm, "When you left, by the time you left, Michael Wearry, Renarda Dominick were already gone?" Trial Tr., p. 2290. And Ms. Helm's answer was, "Yes. We didn't see them, so we assume [sic] they were gone, you know." *Id.* (emphasis added). Yet, Ms. Helm told detectives in April 1999, three years earlier (and only a year after her wedding), that she had seen Petitioner at her reception, and that when she left the reception between 8:30 p.m. and 9 p.m., she did not know whether or not he was still there. August 2012 Hearing Ex. 5, Statement of Rene Helm, at pp. 1-2. When she left, other guests were still there, eating. *Id.* That is, at trial Ms. Helm testified that Petitioner was already gone when she left her reception, but she had previously told investigators that she did not know whether he was still there when she left.

On cross examination at the August 2012 evidentiary hearing, Assistant District Attorney Charlotte Herbert conceded that Ms. Helm's earlier statement could be

construed as inconsistent with her trial testimony, and that the State withheld the statement from the defense. August 14, 2012 Tr., pp. 226: 24 – 227: 3. However, the District Court disagreed with both Petitioner and the District Attorney, concluding that "Ms. Helm's statement would not have been appreciably different from her trial testimony," and was therefore useless as impeachment. Appendix B, at 5-6. It bears repeating that the State presented the testimony of Ms. Helm to the jury to rebut evidence suggesting that Petitioner was in Baton Rouge at the time of the crime. What made Ms. Helm's trial testimony probative was her observation that at 8:30 p.m., she and her husband ***were the last to leave the reception***. This compelled the inference that Petitioner had left the reception by 8:30 p.m.

By contrast, in the suppressed pre-trial statement, Ms. Helm made it clear that ***she was not the last to leave the reception***: some guests remained, still eating. Ms. Helm went on to admit to police that ***she did not know whether Petitioner was still at the reception when she left***. The State therefore used Ms. Helm to convince the jury that Petitioner left the wedding reception early, even though—unbeknownst to defense counsel—she had previously disclaimed any such knowledge. Without Ms. Helm's testimony that she and the groom were the last to leave the reception (the very testimony that is belied by the withheld statement), there would have been no reason for the State to call her as a witness. If anything, Ms. Helm would have been a *defense* witness.

The suppressed evidence of Ms. Helm's prior inconsistent statement, alone or combined with the additional suppressed evidence discussed above, is more than sufficient to undermine confidence in the outcome of Petitioner's trial.

E. The State's Suppression of Evidence was Severely Prejudicial.

The suppression of the evidence described above prejudiced Petitioner. The State had no physical evidence connecting Petitioner, or anyone else, to the crime. Sam Scott, the State's only purported eyewitness to the murder, was a jailhouse informant who had provided a series of wildly inconsistent accounts, casting doubt on whether he had witnessed the events he described. Against this backdrop, evidence directly contradicting Scott's story—medical evidence about Randy Hutchinson and evidence contradicting the State's profession of Scott's pure motives—would have put the case in an entirely different light.

Similarly, the State urged the jury, in opening and in summation, to accept testimony from the State's other key witness, Eric Charles Brown, by repeatedly disclaiming any selfish motive on Brown's part. The State thus admitted that evidence regarding Brown's pure motives was of critical importance to the jury. Evidence to the contrary would have made a meaningful difference to the case presented to the jury, making a different outcome reasonably probable.

Finally, Petitioner had an alibi defense (his presence at a wedding reception in Baton Rouge) that was at one point strong enough to clear him of suspicion. The issue was important enough that the State presented Ms. Helm as a rebuttal witness to attempt to establish his departure time. The suppressed prior statement by Ms. Helm would have made her worthless as a rebuttal witness, because in it she disclaimed any knowledge of Petitioner's time of departure. The suppression was unquestionably prejudicial.

Perhaps the most egregious error made by the District Court in denying relief on Petitioner's *Brady* claims was its use of a piecemeal analysis rather than considering prejudice on a cumulative basis. The District Court focused on each item of suppressed

evidence individually before concluding that each one, in isolation, would not have raised a reasonable probability of an acquittal. There is *no* reference in the District Court's decision to *any* consideration of cumulative prejudice. This piecemeal approach starkly contrasts with this Court's jurisprudence, which requires the evaluation of the importance of the suppressed information in its totality and in the light of the evidence that was presented to the jury at trial. *Kyles*, 514 U.S. at 436. The suppression of all the evidence described above, particularly viewed against the weakness of the State's case, creates an overwhelming showing of prejudice, necessitating relief.

II. WHERE THE DISTRICT COURT'S RULING IGNORED CRITICAL FACTS AND THE LOUISIANA SUPREME COURT ISSUED NO WRITTEN OPINION, THE LOUISIANA COURTS ERRED IN FAILING TO FIND PETITIONER'S SOLE ATTORNEY INEFFECTIVE AT THE GUILT PHASE UNDER *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984).

This Court has long recognized that in capital cases, defendants are due the highest level of procedural protection and due process to protect against error. *See, e.g., Ring v. Arizona*, 536 U.S. 584, 605-06 (2002). The fundamental safeguard for this protection is the defense counsel. However, Petitioner was given a trial counsel who admittedly did not enlist a defense team, did not establish a relationship with his client, did not conduct a guilt investigation, and did not seek input from experts. Trial counsel was not a protector of these Constitutional rights, but instead was the poster child for Constitutionally-deficient representation.

A violation of the Sixth Amendment right to counsel occurs when counsel's performance falls below an objective standard of reasonably effective representation. *See Strickland*, 466 U.S. at 687-88. In determining whether the accused has received effective assistance, courts must be mindful that "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations

unnecessary." *Strickland*, 466 U.S. at 691. In other words, counsel must not "ignore[ ] pertinent avenues for investigation of which he should have been aware." *Porter v. McCollum*, 130 S. Ct. 477, 453 (2009).[8] While "strategic choices made after thorough investigation of law and fact relevant to plausible options are virtually unchallengeable," *Strickland*, 466 U.S. at 690, it is simply implausible to suggest that a choice made due to a complete failure to investigate may be deemed "strategic." And in fact, trial counsel testified at Petitioner's evidentiary hearing that he did not have a strategic reason for failing to consult with or retain a forensic pathologist. August 2012 Tr., p. 359: 17-25; 360: 7. Courts are to consider counsel's deficiencies cumulatively in considering a claim of ineffective assistance of counsel. *Id.* at 686.

Under *Strickland*, Petitioner proves prejudice by showing that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 683. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Id.*

At the August 2012 evidentiary hearing, attorney Jim Boren testified as an expert in the local and national standards for capital defense. Mr. Boren explained that in 2002, an attorney defending a person charged with first-degree murder in Louisiana was required to establish, among other things: (1) a defense team, consisting of two lawyers, a fact investigator, and a mitigation specialist; (2) a relationship with his client, produced through many hours of regular meetings; and (3) a theory of the case, which would be discussed with the jury during opening statements. August 2012 Tr., pp. 389: 22 – 26; pp.

[8] "[W]hen alibi witnesses are involved, it is unreasonable for counsel not to try to contact the witnesses and ascertain whether their testimony would aid the defense." *Bryant v. Scott*, 28 F.3d 1411, 1418 (5th Cir. 1994) (citation omitted). *See also Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991) (affirming writ of habeas corpus based on violation of Sixth Amendment where counsel failed to contact potential alibi witnesses).

391: 22 – 392: 31; pp. 397: 17 –19; pp. 414: 18 – 415: 20. None of these requirements were met by Petitioner's trial counsel, Corbett Ourso.

As described above, trial counsel was the sole attorney representing Mr. Wearry at trial. He had access to an investigator, but the investigator had little experience and was, in trial counsel's opinion, not well-trained. August 2012 Tr., p. 344: 13-15. In any event, the investigator's involvement was limited to interviewing the bride and groom of the Baton Rouge wedding Petitioner attended the night of the murder. Trial counsel had only one documented meeting with his client outside of court proceedings. Finally, trial counsel did not mention Petitioner's alibi during opening arguments.

Mr. Boren also testified that the standard of practice for investigating a case in 2002 would have required the defense team (had there been one) to investigate any co-defendants and to retain a forensic pathologist. August 2012 Tr., pp. 420: 7 – 421: 31. Again, this was not done. Trial counsel did not investigate Petitioner's co-defendants and did not consult with or retain a forensic pathologist to investigate the manner in which Mr. Walber had died. August 2012 Tr., p. 359: 18-19.

In its ruling denying Petitioner relief, the District Court detailed a portion of trial counsel's failings, acknowledging that Petitioner was represented by only one attorney, that trial counsel failed to consult or retain a medical expert or forensic pathologist, and that trial counsel failed to identify and call additional alibi witnesses who were unrelated to Petitioner. Indeed, the District Court was silent as to any positive performance on the part of trial counsel, and conceded that trial counsel's representation was "perhaps not the best defense that could have been rendered." Appendix B, at 4. The District Court nonetheless concluded that trial counsel's performance "was not so deficient as to satisfy the *Strickland* standard and thereby warrant the post-conviction [sic] relief sought . . . ."

Id. In denying relief, the District Court ignored the testimony of key defense witnesses from the post-conviction hearing—Lakendrick Scott, Doris Dantzler-Scott, Paul Hutchinson, and experts Jim Boren[9] and Thomas Streed,[10]— which established failures by trial counsel that were "inconsistent with the standard of professional competence in capital cases" that prevailed in Louisiana in 2002, as described by Mr. Boren. *See Cullen v. Pinholster*, 131 S.Ct. 1388, 1407 (2011).

Without conducting any investigation into Petitioner's co-defendants and the forensic reality of the case, trial counsel could not possibly fulfill the bedrock obligation to make reasonable strategic choices about how best to defend a client. Trial counsel simply failed to investigate, which led to his parallel failure to consult with or retain experts. Such a fact is constitutionally indefensible under any interpretation of *Strickland*. Had trial counsel conducted a reasonable investigation:

- he would have learned of Sam Scott's true whereabouts on the night of Mr. Walber's murder;
- he would have learned of co-defendant Randy Hutchinson's recent surgery that left him on crutches and physically unable to bend his leg or perform the strenuous activities described by Scott, the State's prime witness;
- he would have consulted with a forensic pathologist and uncovered further impossibilities in Sam Scott's description of the manner in which Mr. Walber was killed; and
- he would have identified additional neutral alibi witnesses who could place Petitioner at a wedding reception in Baton Rouge on the night of April 4, 1998.

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[9] Mr. Boren was Petitioner's legal expert.

[10] Dr. Streed is an expert in the Rules of Engagement and Police Investigation and Interrogation Techniques.

These failings, and others, rendered trial counsel's representation ineffective, and his deficient performance prejudiced Petitioner.

A. Trial Counsel Failed to Investigate Key Witness Sam Scott

First, trial counsel failed to investigate whether or not Scott had actually witnessed the crime. Testimony from Lakendrick Scott and Doris Dantzler-Scott, Sam Scott's brother and sister-in-law, established that he had not.

As described above, Lakendrick Scott testified that he was with Sam throughout the day of April 4, 1998, and at least until 10 or 11 p.m., at least half an hour after Mr. Walber's body was discovered. August 2012 Tr., pp. 23: 13 – 22, 24: 1 – 18, 25: 16 –27, 28 – 26: 4, 26: 5 – 23, 17: 17 – 38: 9. Lakendrick's testimony was corroborated by his now-wife, Doris, who confirmed that she met up with the Scott brothers that night, her first official date with Lakendrick. And yet, trial counsel never spoke to Lakendrick Scott or Doris Dantzler-Scott. August 2012 Tr., pp. 362: 6 – 9; pp. 42: 2 – 10. There is a reasonable probability that, had the jury known that Scott did not witness Mr. Walber's murder, the outcome of the proceedings would have been different.

B. Trial Counsel Failed to Investigate Co-Defendant Randy Hutchinson

Second, trial counsel failed to uncover information relating to Randy Hutchinson's knee surgery, despite the fact that each of Scott's statements to investigators prominently featured Hutchinson as a physically active participant in Mr. Walber's murder, getting in and out of the small two-door car; dragging Mr. Walber in and out of the car, sometimes out of the hatchback through the passenger door; and at one point climbing into the hatchback area with Mr. Walber. This story was starkly undermined by the testimony of Hutchinson's father, Paul Richardson, and Dr. Paul Dworak at the August 2012 evidentiary hearing.

Mr. Richardson testified that in the weeks following Hutchinson's March 26, 1998, knee surgery, Hutchinson could not bend his leg or walk unassisted. August 2012 Tr., pp. 159-169; August 2012 Tr., pp. 163: 10 - 165: 25. Dr. Paul Dworak, an orthopedic surgeon, testified based on Hutchinson's medical records that as of May 5, 1998, there had been no disruption of the fixation device used to repair Hutchinson's patellar ligament on March 26, 1998. August 2012 Tr., p. 509: 22-28. Dr. Dworak concluded that had Hutchinson even attempted to engage in the activity described by Sam Scott, the fixation device would have failed and he would not be able to walk.[11] August 2012 Tr., pp. 523: 2 – 528: 5.

The jury did not hear about Hutchinson's surgery or his physical condition on the night of the murder. They did not know that at the time of the murder, Hutchinson was incapable of even walking unassisted. Mr. Boren testified that the standard of practice for investigating a case in 2002 would have required the defense team (had there been one) to investigate the co-defendants, such as Hutchinson, who were alleged to have committed the crime with Mr. Wearry. August 2012 Tr., p. 421: 31. Trial counsel's failure to investigate and present any evidence relating to Hutchinson's physical condition constituted deficient performance. Moreover, this failure undermines confidence in the outcome of Mr. Wearry's trial. If the jury had learned about Hutchinson's condition as

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[11] The State presented evidence from its own orthopedic surgeon, Dr. Greg Kinnett. August 2012 Tr., p. 85: 6-13. Dr. Kinnett testified that it would have been "possible" for Mr. Hutchinson to perform the acts described by Sam Scott. August 2012 Tr., p. 91: 11-21. Dr. Kinnett also testified, however, that Mr. Hutchinson's performance of several of the acts ascribed to him by Scott would present risk to the repair of Mr. Hutchinson's knee. August 2012 Tr., pp. 106: 21 – 108: 7.

The District Court found that the opinion of Petitioner's expert, Dr. Dworak was inconsistent with the State's expert and lay trial testimony, and, somewhat incomprehensibly, that his opinion was also inconsistent with Randy Hutchinson's medical records, which formed the basis of Dr. Dworak's opinion. Appendix B at 4.

observed by his father or through a medical doctor, there is a reasonable probability that the outcome of the proceedings would have been different.

C. Trial Counsel Failed to Consult with or Retain a Forensic Expert

Third, trial counsel failed to consult with a forensic pathologist. As a result, the jury never learned that Scott's account of the manner in which Mr. Walber was killed was not true. Forensic pathologist *Leroy Riddick* testified at the evidentiary hearing that, to a reasonable degree of medical certainty, Scott provided false information to the jury in describing the crime, including statements that the car had "humped over" the victim and that the car had been "revved up" before running over the victim. August 2012 Tr., p. 487: 8-14. Dr. Riddick opined that these things had not happened.[13] August 2012 Tr., pp. 489: 3 – 495: 11.

The failure of trial counsel to consult with a forensic pathologist fell below the standard of practice for a capital case in Louisiana in 2002, according to Mr. Boren. August 2012 Tr., pp. 420: 7. (In fact, Mr. Boren said that a forensic pathologist would have been required even in non-capital murder cases.) *Id.* Had the jury learned that Scott's account of the manner in which Mr. Walber was killed was false, there is a reasonable probability that the outcome of the proceedings would have been different.

D. Trial Counsel Failed to Effectively Cross-Examine Law Enforcement

Fourth, trial counsel did not identify failings in the investigation of the crime and use this information to effectively cross-examine investigators. For example, evidence

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[13] The District Court attempted to reconcile Dr. Riddick's testimony that Mr. Walber had not been hit by the tires of the car with Scott's statements to law enforcement, opining that "another possibility is that the victim may have been between the vehicle's tires" and was "struck only by the vehicle's undercarriage." However, Scott told investigators that the car had actually "hump[ed] up over" Mr. Walber's body. Appendix B, at 4; Trial Tr. at R. 2260.

presented at the hearing showed that Scott's interrogators were a likely source of his information, which evolved toward fitting evidence that they had already identified.[13] Indeed, investigators admitted in depositions taken by post-conviction counsel that they had fed Scott material facts about the case, such as where the victim was taken.[14] While taking a statement from Scott on April 18, 2000, Detective Murphy Martin asked him whether Mr. Walber was taken somewhere on a gravel road. Scott had never mentioned a gravel road prior to this question. *See* August 2012 Hearing Ex. 1, Deposition of Murphy Martin, pp. 44:17-46:22. Detective Martin agreed in his deposition, which was entered into evidence at the evidentiary hearing, that he provided Scott with this material fact.[15] *See* August 2012 Hearing Ex. 1, Deposition of Murphy Martin, pp. 46:18-47:6; 49:5-24; 49:25-50:6.

Trial counsel could have elicited similar admittances from Detective Martin at trial: he had all the facts needed to conduct a thorough cross-examination at his fingertips. All trial counsel needed to do was to read Scott's statements, identify the feeding of

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[13] During their investigation into the murder of Eric Walber, law enforcement failed to adhere to the standard of care in other respects as well. Petitioner presented testimony at the evidentiary hearing from Thomas Streed, an expert in the criminal investigation and interrogation. Dr. Streed testified that when an alleged eyewitness makes statements to investigators that are known to be incorrect, the investigators must examine whether there is a way to verify the witness's statement. *See* August 2012 Hearing Tr. pp. 45:25 – 46:11. Dr. Streed also stated that some false statements by alleged witnesses should cause an investigator to cease crediting that witness's allegations. *See* August 2012 Hearing Tr. pp. 45:3 –10. According to Dr. Streed, Sam Scott's statement that he and Eric Walber were friends was such a statement: after it was made, detectives should not have relied on Scott in any way as they continued their investigation.

[14] Supplying a witness with a material fact about the crime he allegedly witnessed does not comply with the standard of care for police interrogations and investigations. At the evidentiary hearing, this opinion was universally held by Petitioner's expert Thomas Streed, and by Detectives Benita Seger, Kelly Gideon, and Kearney Foster, who agreed that doing so contaminates the evidence. *See* August 2012 Hearing Tr. pp. 107:19 – 108:15; 187:20 – 188:13; 261:20 – 262:22.

[15] Detective Martin was not the only detective to feed Scott information. Detectives Martin, Foster, and Gill asked Scott during his April 25 interrogation whether Mr. Walber's body had been found on Crisp Road. Detective Martin agreed during his deposition that this question also passed along a material fact as to the location of the crime. *See* August 2012 Hearing Ex. 1, pp. 66:5-67:3.

information and ask the obvious questions. Unfortunately, trial counsel's weak attempt to cross-examine Detective Martin harvested equally weak success. None of the significant investigative failures were raised by trial counsel, who did not use any of the failures to cross-examine the detectives who testified.[16]

E. Trial Counsel Failed to Adequately Investigate Petitioner's Alibi

Finally, trial counsel failed to thoroughly investigate and adequately present the jury with Petitioner's alibi defense. Petitioner was at a wedding and reception in Baton Rouge with his girlfriend on the night of the murder, but trial counsel did not have a list of wedding guests by the time of trial. August 2012 Tr., p. 346: 3 – 11. And although the alibi was the sole defense presented, trial counsel did not mention it in his opening statement. Trial Tr. at R. 1724-1725. It was not until trial counsel's cross-examination of the State's tenth witness that Petitioner's alibi was mentioned. Trial Tr. at R. 1864. Trial counsel then only called three witnesses—Petitioner's girlfriend, her sister and her aunt—in support of the alibi. In its guilt phase closing argument, the State urged the jury to disregard the alibi evidence because the three supporting witnesses were all connected to Petitioner. August 2012 Tr., p. 227: 23-26; R. 2311.

At the evidentiary hearing, Petitioner presented evidence from five unbiased witnesses[17] who testified that Petitioner was present at the Helm wedding reception the

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[16] Mr. Ourso also failed to engage an expert such as Dr. Street, who could have informed the jury about the shortcomings in the State's investigation.

[17] The witnesses were: Ed Helm, the groom's best man; Errol Russell, a member of the wedding party; LaTonya Russell, a wedding guest and Errol Russell's wife; Madilena Jordan, a wedding guest; and Carolyn Helm, a wedding guest. A sixth witness, Bobbi White, a wedding guest, testified that she left the reception at about 10:30 p.m., and that other guests were there when she left. A seventh witness, Jeff Turner, the DJ for the wedding reception, testified that he left the reception at 10:30 p.m., and that the bride and groom and other guests were still there when he left. Neither Bobbi White nor Jeff Turner knew Petitioner. August 2012 Tr., pp. 77 – 105; pp. 124 – 158.

evening of April 4, 1998. These witnesses, together with two others who testified as to when the reception ended, all contradicted the State's timeline. The State admitted at the evidentiary hearing that if the jury had heard the testimony of these seven witnesses, the State could not have argued in its closing that all of Petitioner's alibi witnesses were connected to him through his girlfriend. August 2012 Tr., p. 228: 6-28.

The failure by trial counsel to call to the stand—or even to contact—the alibi witnesses presented at the evidentiary hearing was a simple failure to investigate. Trial counsel testified at the hearing that he never interviewed Petitioner's girlfriend, Ms. Dominick, or anyone else in an attempt to compile a list of wedding guests that could substantiate Petitioner's alibi. In fact, trial counsel did not even meet with Ms. Dominick until two days before the trial, in a 30-minute conversation that was not even related to the alibi. August 2012 Tr., pp. 318: 31 – 319: 13. Ms. Dominick testified at the evidentiary hearing that she could have given trial counsel a list of wedding guests, had he asked for one, including guests that were not related to either her or Petitioner. August 2012 Tr., p. 319: 14-21. With respect to his failure to mention Petitioner's alibi in his opening statement, trial counsel testified at the evidentiary hearing that "I don't remember a strategic reason for doing that." August 2012 Tr., p. 354: 7-15.

As Petitioner's legal expert, Mr. Boren, testified, trial counsel's failure to investigate the alibi fall below national and local standards for capital defense.[18] August 2012 Tr., pp. 422: 1 – 423: 6. Had the jury been presented with testimony from the additional neutral

[18] Dissenting from the Louisiana Supreme Court's writ denial, Justice Johnson agreed with Mr. Boren. She found Petitioner's alibi evidence compelling, and said that in her view, trial "counsel's performance fell far below professional norms because there were unrelated witnesses, easily available, who could have been presented to the jury" and that Petitioner was prejudiced as a result. Appendix A, at 4.

alibi witnesses who testified at the evidentiary hearing, there is a reasonable probability that the outcome of the proceedings would have been different.

F. Trial Counsel's Deficient Performance Prejudiced Petitioner

The failure to adequately investigate or present exculpatory evidence—including testimony from experts and Scott's brother and sister-in-law that would have underscored the reliability of Scott's testimony, and testimony from independent witnesses who would have corroborated Petitioner's alibi—prejudiced Petitioner. Had trial counsel performed effectively, the jury would have received credible, compelling evidence of an entirely different narrative than what was presented at trial: that Petitioner was not guilty and that the murder of Mr. Walber could not have occurred in the manner the State urged the jury to believe. In isolation or cumulatively, trial counsel's deficiencies at the guilt phase of the trial compel the conclusion that "the decision reached would reasonably likely have been different absent the errors" *Strickland*, 466 U.S. at 694-96. As such, this Court should grant this Writ and vacate Mr. Wearry's conviction.

CONCLUSION

No physical evidence connecting Petitioner to the murder. Investigating officers providing material facts of the murder to a jailhouse informant. Prosecutor violating *Brady*. Trial counsel who admitted that he conducted, essentially, no investigation, had no strategic reason for not preparing a defense, and met with Petitioner, perhaps, once, before trial. Defense as Aeolian harp.

For the foregoing reasons, the Court should grant Petitioner's petition and issue a writ of certiorari to review the decision of the Louisiana Supreme Court. Alternatively, this Court should grant the writ and remand this case back to the Louisiana Supreme Court for a merits review of the Petitioner's claims for violations of *Brady v. Maryland* and for ineffective assistance of counsel pertaining to the guilt phase of his capital trial in a manner consistent with this Court's jurisprudence.

Respectfully submitted,

Dated: May 27, 2015

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MICHAEL WEARRY

** Counsel of Record*

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL WEARRY,

Petitioner,

vs.

BURL CAIN, Warden Louisiana State Penitentiary,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

CERTIFICATE OF SERVICE

I hereby certify that Petitioner's Motion to Proceed In Forma Pauperis and Petition for Writ of Certiorari were served via regular U.S. Mail, on this 27th day of May, 2015 upon Charlotte Herbert, Livingston Parish District Attorney's Office, 20140 Iowa Street, Livingston, LA 70754. All persons required to be served have been served.

Dated: May 27, 2015

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INDEX OF APPENDICES

Appendix A — Louisiana Supreme Court, *Final Judgment and Decree and Dissenting Opinions*, February 27, 2015

Appendix B — Twenty-First Judicial District Court of Livingston Parish, Louisiana, *Reasons for Judgment*, August 14, 2013

The Supreme Court of the State of Louisiana

STATE EX REL. MICHAEL WEARRY

NO. 2013-KP-2422

VS.

BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA

- - - - - -

IN RE: Wearry, Michael; - Plaintiff; Applying For Supervisory and/or Remedial Writs, Parish of Livingston, 21st Judicial District Court Div. A, No. 01-FELN-015991;

- - - - - -

February 27, 2015

Denied.

CGG

JTK

JLW

MJC

JDH

JOHNSON, C.J., would grant the application for post-conviction relief and assigns reasons.

CRICHTON, J., dissents.

Supreme Court of Louisiana
February 27, 2015

Deputy Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

NO: 13-KP-2422

STATE EX REL. MICHAEL WEARRY

VERSUS

FEB 27 2015

BURL CAIN, Warden,
Louisiana State Penitentiary,
Angola, Louisiana

JOHNSON, C. J., would grant the application for post-conviction relief and assigns reasons:

Michael Wearry was convicted of the brutal first-degree murder of a sixteen-year-old pizza delivery boy and sentenced to death. The murder occurred on April 4, 1998 in Livingston Parish and went unsolved for three years. In his application for post-conviction relief, I find Wearry raises several valid claims with regard to 1) defense counsel rendering ineffective assistance of counsel in the guilt phase and the penalty phase and; 2) whether he is entitled to the protections of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002).

Ineffective Assistance of Counsel at the Guilt Phase

Under the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), adopted by this Court in *State v. Washington*, 491 So.2d 1337, 1339 (La. 1986), a reviewing court must reverse a conviction if the defendant establishes (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and the verdict suspect.

Defense counsel's guilt phase strategy consisted entirely of an attempt to undercut the credibility of the state's witnesses, followed by the presentation of three alibi witnesses. Counsel has acknowledged that at the time of trial he

believed it was unnecessary to investigate the circumstances of the victim's death and conceded that he conducted no independent investigation of the evidence, but instead relied solely upon what the state shared. Further, defense counsel conceded he had no strategic basis for his failure to investigate. In a case in which counsel was aware that the only eyewitness to the murder had given several differing accounts before trial, his decision to contest the state's theory of the case solely by cross-examination fell short of prevailing professional norms. *See Strickland*, 466 U.S. at 688-689, 104 S. Ct. at 2065; *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, pp. 76-80.

The defendant claims trial counsel should have presented additional witnesses to support his alibi and to contradict the state's rebuttal to it. At trial, counsel called relator's girlfriend, Renarda Dominick; her aunt; and her sister; who each testified that relator accompanied them to a wedding reception in Baton Rouge and remained there until 9:00 or 9:30 p.m. on the night of the murder, and that relator did not return to Springfield until between 10:00 and 11:00 p.m. *Wearry*, 03-3067 at pp. 14-15, 931 So.2d at 309. The defendant claims he would have had to leave Baton Rouge no later than 7:30 p.m. to participate in the murder, and asserts that he actually did not leave until 9:00 or 9:30 p.m.

At the post-conviction hearing, relator presented seven additional witnesses who attended the wedding reception and were unrelated to the defendant. Specifically, the additional witnesses were: (1) Ed. Helm, the best man at the wedding, who testified that relator and Renarda arrived at the reception between 7:00 and 7:30 p.m., exh. 99, pp. 81-83; (2) Errol Russell, who saw relator at the reception and spoke with Renarda after the dinner and wedding party toasts concluded, and then spoke with her again 30 to 45 minutes later, *id.* at pp. 146-49; (3) LaTonya Russell, who testified that after an hour or an hour and 30 minutes of dinner and toasts at the start of the reception, Errol Russell left his seat with the

wedding party to join her; that thereafter she met relator; and that she and Errol left with the bride and groom around 10:00 p.m., *id.* at pp. 133-37; (4) Jeff Turner, the DJ at the reception, who testified that he did not close down until between 10:00 and 11:00 p.m. and that when he left the bride and groom were still there, *id.* at pp. 99-104; (5) Bobbi White, who testified that the reception began around 9:00 or 9:30 p.m. and that about half the guests were still there when she left around 10:00 or 10:30 p.m., *id.* at pp. 125-27; (6) Madeline Jordan, who testified that relator and Renarda were not yet at the reception when she arrived; that they later arrived; and that she said goodbye to Renarda and relator who were both still there when she left sometime after dark, *id.* at pp. 155-57; and (7) Carolyn Helm, who testified that she attended the reception from about 6:00 to 9:00 p.m. and danced with Renarda over the course of a couple of hours. *Id.* at pp. 91-95.

Courts have "recognized that when trial counsel fails to investigate and present an alibi witness, '[t]he difference between the case that was and the case that should have been is undeniable.'" *Caldwell v. Lewis*, 414 Fed.Appx. 809, 818 (6th Cir. 2011) (internal citations omitted). Indeed, it has been held that "[e]yewitness identification evidence[, as this case rested on,]... is precisely the sort of evidence that an alibi defense refutes best." *See Griffin v. Warden, Maryland Corr. Adjustment Ctr.*, 970 F.2d 1355, 1359 (4th Cir. 1992).

Counsel's alibi investigation was unreasonably limited given its importance to relator's defense. According to the state's evidence, the victim left his last pizza delivery around 8:20 p.m. and his body was discovered 70 minutes later, at 9:30 p.m. *Weary*, 03-3067, pp. 2-3, 931 So.2d at 302. Given the short timeline in the case, any additional evidence which indicated that relator was at a wedding reception nearly an hour's drive away at any point immediately preceding or overlapping with the 70-minute window in which the abduction and murder took place would have cast doubt on the state's theory of the case.

Given the evidence post-conviction counsel was able to gather several years later, it appears trial counsel could have reasonably done as much or more to establish relator's alibi. Counsel failed to procure and present additional alibi testimony from anyone else, even though it would have been of measurable benefit to present at least one witness who appeared less biased than the three people with whom relator attended the reception. *Cf. Johnson v. Mann*, 1993 U.S. Dist. Lexis 5238, (S.D.N.Y. Apr. 20, 1993) ("As to the alibi issue, counsel made the strategic decision . . . [not] to rely on the inherently suspect testimony of family members."). In my view, counsel's performance fell far below professional norms because there were unrelated witnesses, easily available, who could have been presented to the jury.

Having established that counsel's performance fell short of prevailing professional norms, relator must also show prejudice as a result of counsel's performance. Assuming that some or all of the additional witnesses would have testified at trial as they did at the post-conviction hearing, they would have provided an expanded context for relator's alibi and generally bolstered the credibility of the three witnesses who were presented. The proffered witnesses would have also contradicted the state's rebuttal. In the absence of additional support for his alibi, the verdict was rendered upon an incomplete presentation of the evidence that could have been gathered through a reasonable investigation. Counsel's investigation fell below professional norms and relator was prejudiced as a result.

Ineffective Assistance of Counsel at the Penalty Phase

A defendant at the penalty phase of a capital trial is entitled to the assistance of a reasonably competent attorney acting as a diligent, conscientious advocate for his life. *State v. Fuller*, 454 So.2d 119, 124 (La. 1984); *State v. Berry*, 430 So.2d 1005, 1007 (La. 1983); *State v. Myles*, 389 So.2d 12, 28 (La. 1980) (on reh'g). The

role of an attorney at capital sentencing resembles his role at trial in that he must "ensure that the adversarial testing process works to produce a just result." *Burger v. Kemp*, 483 U.S. 776, 788-89, 107 S.Ct. 3114, 3122-26 (1987).

To show that counsel rendered ineffective assistance at the penalty phase, Wearry must meet the standard set out by this Court in *State v. Hamilton*, 92-2639, p. 6 (La. 7/1/97), 699 So.2d 29, 32, under which it must be shown that counsel failed to undertake "a reasonable investigation (which) would have uncovered mitigating evidence," and that failing to put on the available mitigating evidence "was not a tactical decision but reflects a failure by counsel to advocate for his client's cause," which caused Wearry "actual prejudice." *Hamilton*, 92-2639 at 6, 699 So.2d at 32 (citing *State v. Brooks*, 94-2438 (La. 10/15/95), 661 So.2d 1333; *State v. Sanders*, 93-0001 (La. 11/30/94), 648 So.2d 1272)). This Court has held

> Ineffective assistance of counsel in the penalty phase of capital cases is a recurring problem. In many cases defense counsel, after vigorously contesting the guilt phase, has turned the case over to the jury for penalty determination with little additional evidence or argument, perhaps because the emotional and physical strain on the sole defense counsel in the losing effort in the guilt phase lessens his ability to maintain the same performance level in the immediately following penalty phase.

State v. Williams, 480 So.2d 721, 728, n.14 (La. 1985). The ABA Guidelines provide an instructive overview of the scope of counsel's duty to investigate at the penalty phase in a capital case and provide that counsel explore, *inter alia*, the defendant's: medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage); family and social history (including physical, sexual or emotional abuse; history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); educational history; and

employment and training history. *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, pp. 81-82 (2003).

Wearry's penalty phase consisted of the prosecutor's opening statement, which indicated the state's intention to establish aggravating circumstances warranting the death penalty, defense counsel's opening statement in which he expressed disappointment in the verdict and asked the jury to keep an open mind and make the "just choice;" and defense counsel listing three mitigating factors which may apply:

> The mitigating circumstances that you can consider, among them are prior criminal history. There is some. You determine whether it is significant enough to punish in which direction. The youth of the offender at the time. Michael Wearry was 20 years old at the time. You make that determination as to whether you think that is a mitigation circumstance in your mind. One of them is the offender was a principal whose participation was relatively minor. Well, again, you have already weighed those facts in the guilt phase and you are the one that knows in your mind what you think, whether it was participation in general or a specific participation, you have made that determination and so keep that in mind as you weigh this. And finally, any other relevant mitigating circumstances and we will be attempting to put on family members and let them tell their story to you, also.

Trial Tr. at pp. 2347-48.

Counsel's advocacy for Wearry's life may be classified as subdued, at best. In his opening remark, counsel chose to emphasize three mitigating circumstances, and did so without explaining why Wearry should not receive a death sentence. Counsel failed to elicit any additional mitigating circumstances and failed to argue in closing why the jury should consider anything that was presented to sway it from imposing a death sentence. The evidence that was actually elicited did not constitute the sort of mitigating circumstances that tend to be compelling in a capital case.

Accepting that counsel generally failed to establish any mitigating circumstances, the first inquiry under *Hamilton* is whether a reasonable investigation would have uncovered any mitigating evidence. *See* 92-2639, p. 6,

699 So.2d at 32. The relevancy threshold for mitigation evidence is extremely low and is satisfied by evidence which "'tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" *Tennard* v. *Dretke*, 542 U.S. 274, 284, 124 S.Ct. 2562, 2570, 159 L.Ed.2d 384 (2004) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440-441, 110 S.Ct. 1227, 1232, 108 L.Ed.2d 369 (1990)); La.C.Cr.P. art. 905.5(h). In capital cases, the relevancy standard essentially translates into "whether the evidence is of such a character that it might serve as a basis for a sentence less than death." *Id.*, 542 U.S. at 285, 124 S.Ct. at 2571 (citation and quotations omitted). Critically, a defendant need not show a nexus or causal relationship between his tormented childhood or disabilities and his crime. *Tennard*, 542 U.S. at 287-88, 124 S.Ct. at 2571.

In support of the instant application, post-conviction counsel presented evidence that Wearry's childhood was influenced by abuse, poverty, instability, and neglect. Wearry's older cousin, Daytra Miller, with whom he spent a good deal of time growing up and sometimes resided, illustrated the circumstances of his childhood. Daytra testified that although there were periods of relative stability, Wearry's mother regularly beat him severely enough to leave marks and bruises. Daytra testified that Wearry's teachers sought to place him in special education, but his mother was opposed to special assistance, and that Wearry regularly struggled with homework. According to Daytra, the method employed by Wearry's mother to assist him with homework was to hit and whip him when he failed to give correct answers. Daytra testified that she knew Wearry had often been disciplined at school for bad behavior, but that she and her siblings tried to intercept teachers' notes to shield Wearry from being beaten as punishment. Corroborative of Daytra's testimony regarding the physical abuse, when Wearry was sent to live in California at age 12, his father and step-mother observed that he

was covered in welts and bruises upon arrival. Wearry's father then discovered that his mother's new husband, Larry Sibley, had also been beating Wearry.

The district court neglected to address counsel's penalty phase performance, but rather denied relief because it found the evidence insufficient to establish that Wearry was mentally retarded and therefore insufficient to show a reasonable probability of a different outcome. Upon review of the trial transcript and evidentiary hearing testimony, however, it is evident that a reasonable penalty phase investigation would have uncovered a substantial amount of relevant mitigating evidence, which was not presented to the jury. *See Hamilton*, 92-2639, p. 6, 699 So.2d at 32; *see also Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background [or to emotional and mental problems] may be less culpable than defendants who have no such excuse.") (internal quotation marks omitted)); *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982) ("[T]here can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant."). Post-conviction counsel presented evidence that, in addition to the physical abuse inflicted while in his mother's custody, Wearry has cognitive problems, brain damage, and Fetal Alcohol and Post-Traumatic Stress Disorders. Such findings would have served as compelling mitigating evidence. Although counsel consulted with Wearry and interviewed his family, he failed to conduct a meaningful investigation into his mental health and childhood, which may have persuaded jurors to spare his life. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 41, 130 S.Ct. 447, 454, 175 L.Ed.2d 398 (2009) (finding that evidence of poor mental health or mental impairment, in addition to other mitigating evidence, could influence a jury's appraisal of

defendant's moral culpability); *see also Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) ("[E]vidence about defendant's background and character is relevant because of the belief . . . that defendants who commit criminal acts that are attributable to . . . emotional or mental problems . . . may be less culpable than defendants who have no such excuse."), abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

The second inquiry under *Hamilton* is whether counsel had a tactical reason for failing to investigate and present mitigating evidence. *See* 92-2639, p. 6, 699 So.2d at 32. Upon reviewing his penalty phase performance, counsel admitted that he did not conduct any investigation and did not hire a mitigation specialist. He also testified that he had no tactical or strategic reason for these failings, save a perception that the public defender's limited resources would not permit it. However, lack of funding does not constitute a strategic basis for failing to advocate on a defendant's behalf, especially in a capital case. *See generally Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, (counsel has an independent duty, even in the face of a defendant's refusal to cooperate or his outright opposition, to delve into the defendant's background for mitigating evidence that might persuade a jury to spare his life). *See generally State v. Sparks*, 88-0017 (La. 5/11/11), 68 So.3d 435, 484 ("[W]hile the failure to present mitigating evidence at trial can be reasonable if shown to be the result of tactical decision, the failure to investigate the existence of such evidence is ineffective assistance of counsel.") (citing *State ex rel. Busby v. Butler*, 538 So.2d 164, 171 (La. 1988) (collecting cases)).

Finally, the last inquiry under *Hamilton* is whether Weary suffered prejudice as a result of counsel's deficient performance, or rather, whether the jury would still have found the death penalty warranted if it had heard the mitigating

circumstances. *See Hamilton*, 92-2639, p. 6, 699 So.2d at 32. Because of the relatively superficial evidence presented on Wearry's behalf at the penalty phase, it is likely the jury was convinced there were no truly mitigating circumstances. Thus, as a result of counsel's failure to investigate, the jury was left unaware of evidence that Wearry suffered from Fetal Alcohol Spectrum Disorder, Post-Traumatic Stress Disorder, and intellectual and cognitive impairments. Given that jurors "must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime," it is reasonable to conclude that Wearry suffered prejudice in the minds of at least some jurors in the absence of the mitigating evidence now presented. *See Blystone v. Pennsylvania*, 490 U.S. 299, 304-05, 110 S.Ct. 1078, 1082, 108 L.Ed.2d 255 (1990) (*quoting Penry*, 492 U.S. at 327-28, 109 S.Ct. at 2951). *See State v. Ford*, 10-1151 (La. 2/4/11), 57 So.3d 297; *see also State v. Brooks*, 94-2438 (La. 10/16/95), 661 So.2d 1333, 1339; *State v. Sullivan*, 596 So.2d 177, 192 (La. 1992) *rev'd on other grounds*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (finding ineffective assistance at penalty phase in capital case where counsel failed to present evidence of defendant's mental impairment, that he was severely abused as a child, and that his mother and sisters loved him; and concluding that evidence of mental illness "has the potential to change totally the evidentiary picture by altering the causal relationship which can exist between mental illness and homicidal behavior." (citing *Busby*, 538 So.2d at 173)).

Atkins v. Virginia

The defendant claims he is exempt from capital punishment because he is mentally retarded. He argues the trial court erred in finding this claim procedurally barred and in concluding that he failed to show a reasonable probability that the outcome would have been different. Mr. Wearry asserts that the proper test is not whether he has demonstrated that the outcome would have been different if he had

raised the claim at trial, but rather whether he has shown by a preponderance of the evidence that he is mentally retarded.

The American Association on Intellectual and Developmental Disabilities (AAIDD) and the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) define mental retardation as significantly subaverage intellectual functioning accompanied by significant limitations in adaptive functioning, originating before the age of 18. *Atkins v. Virginia*, 536 U.S. 304 at 308 n.3, (2002). The Court in *Atkins* embraced these definitions of mental retardation. *Id.* at 308. Louisiana, however, has seized upon language in *Atkins* that permits lower courts and state legislatures to define their own procedural rules to "enforce the constitutional restriction," as license to apply methods that deviate from and are more restrictive than the accepted scientific and clinical definitions. *Atkins'* directive mandates that states may establish procedural rules, but should adhere to the scientific and clinical definitions of mental retardation set forth by the AAIDD and the DSM-IV-TR. *Atkins*, 536 U.S. 304, 317 (2002) (citing *Ford v. Wainwright*, 477 U.S. 399 (1986). The Court gave states authority over the procedures used to implement the categorical exemption, such as whether determinations of mental retardation should be made by a judge or by a jury, whether determinations should occur before or after guilt-innocence trials, which party bears the burden of proof, and what entitles a mental retardation claim to an evidentiary hearing or bars it by procedural default. The Court also anticipated case-by-case dispute over the fact-intensive determination of whether a particular defendant has mental retardation. But, the Court did not give states license to narrow the class of persons who fall within the constitutional prohibition. Deviations in how mental retardation is defined can result in exactly what *Atkins* prohibits: the execution of capital defendants who have mental retardation.

Under *State v. Williams*, 01-1650, p. 27 (La.11/01/02), 831 So.2d 835, 857, to establish mental retardation, a defendant must first show that he has significantly sub-average intelligence, as generally measured by standardized IQ tests. *Williams*, 831 So.2d at 853-54. The Wechsler and Stanford-Binet IQ tests are frequently used to assess intelligence and both utilize a mean score of 100. *Id.* at p. 23, n.26, 831 So.2d at 853. The Wechsler scale uses a standard deviation of 15 in assessing whether a score indicates above or below average intelligence. *Id.* Thus, a person with a score two standard deviations below average would score an IQ of 70 on the Wechsler scale. However, sub-average general intellect, as indicated by an IQ score, is not the sole criterion for determining whether a person is mentally retarded: sub-average intellect must be accompanied by significant deficits in adaptive skills which manifested during the developmental stage. *Id.*

The defendant's I.Q scores are 72 and 75. A person is considered mentally retarded within this range if their adaptive functioning is substantially impaired. (Citing DSM-IV at 42.) According to Dr. Shaffer, a clinical and neuropsychologist hired by the defense, defendant's test results on the Adaptive Behavior Assessment indicate significantly sub-average adaptive functioning. Dr. Shaffer testified that the defendant may have been genetically predisposed to suffer from mental retardation because his mother has an IQ of 65 and one of his sisters was mentally retarded with severe behavioral problems. Dr. Hope administered the Adaptive Behavior Scale to defendant, which shows that defendant suffered from impaired adaptive skills at age 16. The defendant also presented evidence demonstrating academic impairment at or below 6th grade levels, as well as evidence of deficits in daily skills and that his disorders manifested prior to his 22nd birthday. *See Williams*, 01-1650, p. 24, 831 So. 2d at 854. Based on these facts, the defendant has demonstrated that he is not subject to the death penalty pursuant to *Atkins*.

In addition, post-conviction counsel presented expert testimony and evidence demonstrating that Wearry had been diagnosed with Fetal Alcohol Spectrum Disorder and, as a result, displayed intellectual and adaptive functioning impairments. Wearry was also diagnosed with Post-Traumatic Stress Disorder, resulting from the ongoing physical abuse which was "so severe that [it] caused [Wearry] to fear for his life," and an incident of sexual assault which occurred when his mother left him unattended. According to Dr. Robert Shaffer, Wearry's mother drank so excessively that she often wandered off and left her children for several days. On one such occasion, when Wearry was seven or eight, he and his siblings were left unsupervised at the home of another person. While there, a group of teenaged boys stripped Wearry of his clothing in the bathroom and assaulted his anus with an alcohol bottle. Wearry's older brother Cornell testified that he heard Wearry screaming and attempted to rescue him but was prevented by the assailants. Cornell told Dr. Shaffer that, after the incident, Wearry was a changed person; much less trusting and avoided bathing whenever possible. According to one of Wearry's teachers around this time, he began to display exaggerated and startled reactions with little prompting. Further, Dr. Shaffer testified that Wearry has cognitive defects, neurological impairment, and is of sub-average intelligence. State-hired psychologist, Dr. Donald Hoppe, agreed that Wearry suffered from cognitive problems, brain damage, abuse, and post-traumatic stress disorder. The testimony presented paints a picture of a young man with an extremely troubled upbringing and sub-average intelligence. In my view, he has sufficiently demonstrated entitlement to the protections afforded by *Atkins*.

SUPREME COURT OF LOUISIANA

No. 13-KP-2422

STATE EX REL.
MICHAEL WEARRY

FEB 17 2015

v.

BURL CAIN, Warden,
Louisiana State Penitentiary,
Angola, Louisiana

SC

CRICHTON, J., dissents

I dissent from the majority's denial of this writ application. In my view, this writ should be granted and the case remanded to the trial court to directly and fully address the issue of whether defendant is intellectually disabled[1] and entitled to the protections of *Atkins* v. *Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and it should not be considered under the vast umbrella of the defendant's claim of ineffective assistance of counsel. Specifically, I believe the trial court erred by conflating the *Atkins* claim with the ineffective assistance of counsel claim, thereby underweighting the defendant's

[1] The term "intellectually disabled" was adopted by the United States Supreme Court in *Freddie Lee Hall* v. *Florida*, 134 S. Ct. 1986, 1991, 188 L.Ed.2d 1007 (2014):

> Previous opinions of this Court have employed the term "mental retardation." This opinion uses the term "intellectual disability" to describe the identical phenomenon. See Rosa's Law, 124 Stat. 2643 (changing statutes in the U.S. Code from "mental retardation" to "intellectual disability"); Schalock et al., The Renaming of Mental Retardation : Understanding the Change to the Term Intellectual Disability, 45 Intellectual & Developmental Disabilities 116 (2007). This change in terminology is approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the tools most used by psychiatrists and other experts; the manual is often referred to by its initials "DSM," followed by its edition number, e.g., "DSM-5." See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013).

Atkins claim. As such, I would grant this writ application and remand it to the trial court to reconsider the evidence adduced pertaining to defendant's *Atkins* claim, and allow the district attorney and defense counsel to supplement and further develop the record on whether the defendant is actually intellectually disabled. If the defendant is deemed intellectually disabled and afforded the protections under *Atkins*, he is exempt from the death penalty and that claim, in my opinion, cannot be procedurally defaulted.

NOTICE OF REASONS FOR JUDGMENT

State of Louisiana

Vs

MICHAEL WEARY

Case 02-FELN-0(1291)
Division A
21st Judicial District Court
Parish of Livingston
State of Louisiana

August 14, 2013

DAVID MOYES CAPITAL POST CONVICTION PROJEC
1340 POYDRAS STREET SUITE 1700

NEW ORLEANS, LA 70112

Please find attached a certified copy of the Reasons for Judgment signed by the Honorable WAYNE RAY CHUTZ on August 14, 2013.

If I can be of further assistance, please do not hesitate to call.

Thomas L. Sullivan, Jr.
Livingston Parish Clerk of Court
21st Judicial District Court
State of Louisiana
Parish of Livingston

Deputy Clerk of Court

STATE OF LOUISIANA	21st JUDICIAL DISTRICT COURT
VS. NO. 01-FELN-001393	PARISH OF LIVINGSTON
MICHAEL WEARY	STATE OF LOUISIANA
FILED:_____	_____
	DEPUTY CLERK OF COURT

REASONS FOR JUDGMENT

This matter came before the Court as an Application for Post Conviction Relief (PCR) pursuant to La. C.Cr.P. arts 924 *et seq*, following a trial held in March, 2002, which resulted in a conviction for first degree murder and recommendation of the death sentence for the defendant, Michael Weary. On November 28, 2011, after several status conferences the State and counsel for defendant entered into a stipulation that the defendant was entitled to an evidentiary hearing pursuant to La. C.Cr.P. art 930.

Prior to the commencement of the evidentiary hearing, both the State and defense counsel agreed to bifurcate the presentation of evidence into two phases: the first phase to hear evidence related to issues presented in the application concerning the guilt portion of the trial, and the second phase to be for the taking of evidence relevant to the sentencing portion of the trial, in the context of issues presented in the PCR Application. The first phase of the hearing was conducted from August 13-21, 2012. The hearing was then resumed until June, 2013, when the hearing was reconvened for the purpose of taking evidence related to the penalty phase.

After the conclusion of the presentation of evidence, and after giving both the State and defense counsel 15 days to file any post-trial memoranda they deemed appropriate, the court took the matter under advisement. A review of the record indicates that memoranda for both the State and defendant have been filed. Accordingly, the court now issues the following findings and reasons for judgment.

The defendant's application may be summarized as alleging five issues as bases for relief: 1) Ineffective assistance of counsel in the guilt and (2) penalty phases of the trial; 3) Failure of the State to provide exculpatory evidence during the guilt phase, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and 4) A post-trial assertion of Mental Retardation as a defense to the imposition of the death sentence under La.C.Cr.P. art 905.5.1. Each issue will be addressed

CLERK OF COURT
PARISH OF LIVINGSTON

accordingly.

INEFFECTIVE ASSISTANCE OF COUNSEL

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Court articulated a two-part test for determining when counsel's ambivalence may be deemed so ineffective as to result in a denial of a defendant's Sixth Amendment Right to Counsel. First, the defendant must show that counsel made errors so serious that he was not functioning as contemplated by the Sixth Amendment. *Id.* at 687. Second, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* At 694. The *Strickland* Court further noted that, when applying this two-pronged test in order to ascertain whether articulated errors by counsel created the necessary level of prejudice, a reviewing court should "presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." *Id.*

The defendant asserts that Corbett Dunn, Jr., was the sole attorney representing him during the trial as his first point in support of his claim of ineffective assistance of counsel. A review of all trial court minutes indicates that the Office of the Public Defender for the 21st Judicial District was appointed to represent Mr. Weary at arraignment. The appointment was made pursuant to La. R.S. 9:143, which was in effect during the time relevant to the prosecution of the defendant.

Absent an evidentiary showing to the contrary, this court must presume that the Office of the 21st Judicial District Public Defender complied with the standards governing appointment of counsel as forth in the 2021 version of La. R.S. 15:143 A. (1)(a). However, even if the relevant standards governing appointment of defense counsel in capital cases were not complied with, it is incumbent upon the applicant to also show that the violation created actual prejudice. The applicant has made no such showing.

Other than cross-examining the state's witnesses, Mr. Weary's counsel primarily relied upon an alibi defense during the guilt portion of the trial. The basis of the alibi defense was that, because Mr. Weary had attended a wedding reception in East Baton Rouge Parish, he would not have been present in Livingston Parish at the time of the abduction of the victim.

In support of this theory, defense counsel called three witnesses that had attended the

wedding reception, namely: Darlene Johnson; Kim Dominick Armstrong; and Rosario Dominick. All testified that the defendant, Michael Weary, had attended the wedding reception. However, the witnesses were not able to agree as to when Mr. Weary may have departed the wedding reception.

In the instant application, defendant contends that, after a thorough investigation by his post-conviction relief team, numerous witnesses were discovered that could have offered testimony favorable to him at the trial. Defendant asserts that the failure to call these witnesses constituted ineffective assistance of counsel, and that, under the second prong of the *Strickland* analysis, this resulted in the defendant's having been deprived of a trial with reliable results.

After thoroughly considering the testimony of the dozen or so witnesses called by the defendant on August 13-14, 2013, it is apparent that all witnesses, including those called, seem to agree that Mr. Weary did in fact attend the wedding reception; but their accounts are markedly inconsistent as to when Mr. Weary may have departed the reception. As such, based upon the additional testimony, a reasonable trier of fact could have concluded that Mr. Weary did, in fact, attend the reception. However, because the pivotal issue in establishment of a viable alibi defense was the time of Mr. Weary's departure, the additional testimony could not have produced a more favorable result to Mr. Weary than that effected by the three witnesses actually called at trial. Consequently, insofar as failing to call these witnesses has been alleged as a basis for the defendant's claim of ineffective assistance of counsel, such failure ultimately created no prejudice to Mr. Weary.

Counsel for the defendant also called two expert witnesses at the evidentiary hearing: Dr. Leroy Riddick, M.D., who was accepted by the court as an expert in the area of Forensic Pathology; and Dr. Paul Dworak, M.D., who was accepted by the court as an expert in the area of Orthopedic Surgery. The testimony of these experts was introduced as evidence of Mr. Curso's failure to properly test the State's theory of the mechanism of the killing of the victim, insofar as said theory was testified to at trial.

Dr. Riddick opined that the injuries sustained by the victim were inconsistent with being run over by a vehicle several times. In particular, Dr. Riddick stated that, if the vehicle had run over the victim as testified to at trial by Sam Scott, the resulting injuries should have been consistent with spinning tires; in particular, the victim would have sustained tearing of the skin,

and some rubber would have been transferred from the vehicle's tires to the body of the victim. However, Dr. Riddick's opinion assumes that the tires of the vehicle actually passed over the victim. Another possibility is that the victim may have been between the vehicle's tires, in which case the victim would have been struck only by the vehicle's undercarriage.

Dr. Dworak opined that the knee surgery performed on Randy Hutchinson eight days prior to the murder would have prevented Hutchinson from acting in the manner indicated by the State's witness, Sam Scott, at trial. Dr. Dworak's opinion is inconsistent with Hutchinson's medical records; the opinion of Dr. Greg Kinnet, the State's expert; and lay testimony offered at trial. While this court does not necessarily concur with the State in asserting that Dr. Dworak's conclusion may be "ridiculous," this court is of the opinion that Dr. Dworak's opinion would not have created a reasonable probability of a different outcome, and therefore that Mr. Owen's failure to offer the same did not undermine confidence in the verdict.

As the *Strickland* Court noted, "[i]t is not enough for the defendant to show that the [allegedly deficient counsel's] errors had some conceivable effect on the outcome of the proceeding." *Strickland* v. *Washington*, 466 U.S. at 693. Accordingly, this court finds that the representation afforded to Mr. Weary by Mr. Owen during the guilt phase of the trial, while perhaps not the best defense that could have been rendered, was not so deficient as to satisfy the *Strickland* standard and thereby warrant the post conviction relief sought in the instant application.

BRADY VIOLATIONS

Brady v. *Maryland*, *supra* at 87, the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Evidence is material to a finding of guilt, and therefore must be disclosed, where there is a reasonable probability that effective use of the evidence will result in an acquittal. *United States* v. *Bagley*, 473 U.S. 667, 676 (1985).

The applicant's listing of evidence of Brady violations may be classified as noting four categories of evidence not presented by the State prior to trial: Randy Hutchinson's medical records; Ms. Hahn's inconsistent statements regarding timing of the applicant's departure from the wedding reception; trial witness Eric Charles Brown's seeking of leniency in exchange for his

testimony; and evidence regarding "a host of alternate suspects[.]"

Because it is necessarily difficult for the prosecution to assess whether evidence may be classified as "material" prior to trial, this court is of the opinion that, as a matter of policy, it is better to err on the side of disclosure. As such, insofar as the State failed to produce the evidence listed in the instant application, it probably ought to have done so. Unfortunately for the viability of the applicant's claim for relief in this context, however, and after thorough consideration, this court is of the opinion that none of the evidence noted in the instant application may be categorized as "material" in the context of possible Brady violations. Further, even in the event that the fact of non-disclosure itself may be classified as a violation, none of the evidence identified, in the event that it had been effectively utilized by defense counsel at trial, produces a reasonable probability that the defendant would have been acquitted.

First, Randy Hutchinson's medical records do not show that he could not have participated in the crime by virtue of his physical condition. To the contrary, Hutchinson's medical records indicate that he was not compliant with the limitations on physical activity prescribed by his treating physician. When viewed in the context of testimony of the State's expert, Dr. Greg Kjonet, who opined that Hutchinson would in fact have acted in a manner consistent with the account of Hutchinson's actions as attested to in layperson testimony, the inclusion of Hutchinson's medical records as evidence produced to defense counsel, even assuming effective utilization of such records by counsel, does not produce a reasonable probability of acquittal.

Second, Ms. Heim's statement regarding the possible time of the applicant's departure from the wedding reception differs very little from her testimony at trial. In both her statement to police and her trial testimony, she indicated that she was not certain of the applicant's time of departure. In both accounts, Ms. Heim approximated that she had left the reception between 8:30 and 9:00 p.m. In her statement, Ms. Heim indicated that she was not sure whether the applicant was still present at the reception when she left; at trial, Ms. Heim testified that she had not seen the applicant at the time that she left and had assumed that he was gone.

Ms. Heim's uncertainty as to the time of the defendant's departure was consistent with the accounts of other witnesses called by defense counsel at trial. Additionally, because Ms. Heim's statement would not have been appreciably inconsistent with her trial testimony, it would

not have been an effective method of impeaching her testimony. As such, her statement cannot be properly classified as "material" in a Brady analysis, nor can it be said to produce a reasonable probability of acquittal.

Third, the applicant asserts that the State failed to disclose its witness Eric Charles Brown's attempt to seek leniency in exchange for testimony. Disclosure of this information and its effective utilization by defense counsel could arguably have had a measurable effect on the weight afforded by the jury to Brown's testimony. However, there is no evidence to suggest that Brown was actually able to obtain any benefit or any assurance of a possibility thereof prior to testifying at trial. Further, taken in the context of all of the evidence produced at trial to incriminate the defendant, the evidence regarding Brown's attempt to acquire some advantage by testifying would not have produced a reasonable probability of the defendant's acquittal.

Finally, with regard to the applicant's assertion that the State failed to produce information linking individuals other than the applicant to the crime, the weight of the evidence against the defendant at trial was sufficient to justify a finding of guilt, even in the presence of evidence of other possible suspects. As such, this court is of the opinion that such information was not "material" pursuant to *Brady v. Maryland*, *supra*, and its progeny.

ATKINS CLAIM

Applicant asserts that he has established that he suffers from mental retardation. Therefore, applicant argues that he is exempted from capital punishment pursuant to the Eighth Amendment to the United States Constitution's prohibition against cruel and unusual punishment, as set forth in *Atkins v. Virginia*, 536 U.S. 304 (2002). This court is of the opinion that the applicant's claim is procedurally barred. Even assuming that the applicant has properly introduced a claim of ineffective assistance of counsel, this court finds that the applicant has not met the criteria for proving that he is mentally retarded, and therefore that he has not satisfied the second prong of the *Strickland* test.

The applicant's assertion of mental retardation was not presented to the trial court. After the Supreme Court's decision in *Atkins*, *supra*, and in accordance with the *Atkins* Court's pronouncement that it was leaving the States the task of implementing the methods for enforcement of its directive (*Atkins* at 317), Louisiana enacted La. C.Cr.P. Art. 905.5.1. Section B of that article provides that "[a]ny capital defendant who claims to be mentally retarded shall

file written notice thereof within the time period for filing of pretrial motions as provided by Code of Criminal Procedure Article 521. (Emphasis added). In addition, pursuant to La. C.Cr.P. Art. 841, an error of which a defendant wishes to avail himself after conviction must be objected to at the time of its occurrence. Finally, the state supreme court has noted that it will not consider any alleged errors with regard to the penalty phase of trial, in the absence of a contemporaneous objection at trial. *State v. Bell*, 09-0199 (La. 11/30/10); 53 So. 3d 437, 455; *also see State v. Hawkins*, 486 So. 2d 643, 647 (La. App. 1st Cir. 10/5/86); *writ denied*, 500 So. 2d 420 (La. 1987). Therefore, because the applicant's defense of mental retardation was not raised at trial, it is not now properly asserted in his application for post-conviction relief.

To the extent that the applicant has introduced an allegation of ineffective assistance of counsel, this court finds insufficient proof of mental retardation; therefore, the applicant has not demonstrated a reasonable probability of a different outcome. Testimony introduced by both the state and the applicant indicated that the applicant likely suffers from both Fetal Alcohol Spectrum Disorder, a term describing any number of a range of effects occurring in an individual whose mother drank alcohol during pregnancy, and Post Traumatic Stress Disorder, a condition developing after an individual is exposed to traumatic events. Otherwise, evidence was extrapolated from recounted recollections, including those of the applicant's mother (a self-professed alcoholic; drug addict; and abusive parent); aunt; and sister. Post-conviction counsel also introduced evidence of the applicant's participation in special education classes during the applicant's primary and secondary school years.

As noted by the Court in *Atkins*, "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins* at 317. La. C.Cr.P. Art. 905.5.1(H)(2) provides a list of nineteen conditions, noting that a diagnosis of one or more of those conditions does not necessarily constitute mental retardation. It is the opinion of this court that diagnoses of Fetal Alcohol Spectrum Disorder and Post Traumatic Stress Disorder, compounded with impressions of the applicant's intellectual abilities recalled and recounted over two decades later, are not sufficient to prove that the applicant is mentally retarded. Therefore, this court cannot conclude that admission of evidence of the applicant's alleged mental retardation at trial would have been sufficient to introduce a reasonable probability of a different result; insofar as the applicant's

assertion of mental retardation may be viewed in the context of a claim of ineffective assistance of counsel, such claim is not cognizable.

For the reasons hereinabove stated, this court finds that the claims asserted in Michael Weary's Application for Post Conviction Relief are without merit. Accordingly, the Application is denied.

Livingston, Louisiana this 14 day of August, 2013.

JUDGE WAYNE RAY CHUTZ
21st Judicial District Court, Division "A"

Please send notice to all counsel.

STATE OF LOUISIANA
VS. NO. 01-FELN-0015992
MICHAEL WEARY
Reasons for Judgment on Post Conviction Relief

21st JUDICIAL DISTRICT
PARISH OF LIVINGSTON, LA
A true copy of the original
This 8/14/2013
Deputy Clerk of Court

ORIGINAL

Supreme Court, U.S.
FILED
AUG 24 2015
OFFICE OF THE CLERK

~~No. 11-7669~~
14-10008

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL WEARRY
Petitioner,

versus

BURL CAIN, Warden, Louisiana State Penitentiary,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

OPPOSITION TO WRIT OF CERTIORARI

CAPITAL CASE

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STATEMENT OF THE FACTS

The facts of the case as found by the Louisiana Supreme Court on direct appeal are as follows:

> The record shows that, after the murder was first discovered, authorities undertook an investigation to discover the perpetrator or perpetrators of the crime. As the investigation continued, authorities were unable to discover who was responsible. Not until two years later did a break come in the case. The following information was presented by the state at trial.
>
> At approximately 9:30 p.m. on April 4, 1998, the body of a teenaged boy was discovered lying face down alongside Crisp Road in Tangipahoa Parish, Louisiana. The gravel road where the body was found was dark and there was no vehicle in the area. The body was covered in blood. Another large puddle of blood was observed at a short distance from the body where there was the imprint as of a body in the gravel. Nearby, police found a receipt for a pizza delivery to a person named Mary Ann Davis.
>
> The autopsy of the 5'11", 190 lb. body revealed considerable injury to most of the body surfaces, but the main injury was to the victim's head and face. There were multiple lacerations on the victim's scalp and face extending down to the skull, including a palpable skull fracture. In addition, there were brush burns on the victim's face, cheeks and the point of his chin. There were lacerations on the inside of the victim's lips. Extensive lacerations and abrasions were scattered throughout the whole of the victim's body, including the victim's arms and shoulders.
>
> As noted by the expert pathologist who conducted the autopsy, the body initially resembled an individual who had sustained a motor vehicle accident where the person was ejected from the car onto asphalt, concrete or gravel. This impression was dispelled, however, upon examination of all of the head wounds. These head wounds led the expert to believe that a homicide had occurred. There were no broken bones except for the victim's skull. The victim died at the scene due to a combination of the injuries to his head.[1] [Fn. 1 The cause of death was officially noted as multiple sharp and blunt trauma to the body and especially the head, with subdural subarachnoid hemorrhages of the brain and skull fracture.]
>
> In the early morning hours of April 5, 1998, Cherie Walber identified the body as that of her son, Eric Walber.[2] [Fn. 2 Cheri Walber could not identify her son by his facial features. Not until she looked at his tennis shoes and the rest of his body was Ms. Walber able to recognize her son.] Walber, a 16-year old student at Albany High School, worked part-time as a delivery boy at Pizza Express in Albany, Louisiana, and used his red Ford Escort to make deliveries. Walber had been working the night of April 4, 1998, and his last known delivery was to Mary Ann Davis on Blahut Road, in Albany. Walber arrived at Davis' residence sometime around 8:15 p.m. and stayed for approximately five or six minutes.
>
> Cheri Walber gave police a description of her son's car and its contents. She stated that Walber did not wear a uniform while working and that his car had

no decal or other identifying feature that would have indicated he was delivering pizza. Walber had been intending to leave on a ski trip the next day with friends, and his mother informed police that he would have been carrying approximately $200 in cash for the trip in his tri-fold wallet. In his car, Walber kept a policeman's nightstick for protection. Because his luggage had been sent ahead, Walber had a backpack and smaller "fanny" pack in his car packed for the trip. In his backpack, Walber had a pair of Girbaud jeans and a Tommy Hilfiger shirt. In addition, Cheri Walber told police that her son had taken a Scrabble board game, a deck of cards, a handheld electronic game and some Tommy Hilfiger cologne for the trip. She knew that Walber had borrowed a portable CD radio from a friend to take on the trip. Walber's car also contained a new set of speakers still in their packing box. Ms. Walber informed police that her son carried a wallet and wore an Albany High School ring and watch.

Initial Investigation

The initial investigation by the Tangipahoa Parish Sheriff's Office of the location where the body was found revealed long skid marks in the gravel of Crisp Road. Blood was found at the termination of the skid marks and was scattered about in different areas. One eyewitness described the road as looking like someone had spun the tires of a vehicle or was going very fast and then skidded.

The victim's car was discovered on April 8, 1998 behind an abandoned school in nearby Livingston Parish, Louisiana, and was sent to the crime lab for processing. A large blood-stained area was found in the hatchback of the vehicle and more blood was found throughout the car. All of the blood was consistent with the victim; no DNA foreign to the victim was recovered. Although several partial fingerprints or smears were found, none was suitable for identification.

The Tangipahoa Parish Sheriff's Department, and the nearby Livingston Parish Sheriff's Department which was assisting, received leads and information from several persons. Michael Weary was questioned as a possible suspect, but claimed he had been at a wedding the night of April 4, 1998. Many people were questioned in connection with this matter, but the case remained dormant for years.

Sam Scott Comes Forward

Two years later, Sam Scott, an inmate at Hunt Correctional Center, asked to speak to Livingston Parish authorities in April 2000. At that time, Scott was incarcerated on an unrelated conviction for distribution of cocaine with a five year sentence. His sentence qualified him for the boot camp program at Hunt. After completion of the boot camp program, he could have been released on intensive parole in 180 days. However, Scott's conscience was bothering him and he could neither eat nor sleep; consequently, he asked the boot camp program administrator to contact Livingston Parish authorities.

Prior to his coming forward, the name of Sam Scott had never come up in the investigation of Walber's murder by officials in either Tangipahoa Parish or Livingston Parish. When Scott met with the Livingston Parish detectives, he gave several differing accounts of Walber's murder and of his involvement, as well as the involvement of neighborhood friends whom he had known for years.

Ultimately, Scott gave four recorded statements to police[3] [Fn. 3 The dates these statements were recorded are: (1) April 18, 2000 at 10:07 a.m.; Vol. 1, p. 127-132; (2) April 28, 2000 at 10:36 a.m.; Vol. 2, p. 339, 337, 334, 341-345; (3) April 25, 2000 at 11:21 a.m.; Vol. 1, p. 133-147; and (4) May 1, 2000 at 2:50 p.m.; Vol. 1, p. 148-161] and one unrecorded statement,[4] [Fn. 4 Police interviewed Scott and obtained an unrecorded statement from him on April 24, 2000. Vol. 2, p. 338, 340.] each differing in certain respects. However, in each of his statements, Scott implicated the defendant, Randy Hutchinson, James Skinner, Shadrick Reed and Darrell Hampton.

Scott testified at the defendant's trial that on the evening of April 4, 1998, after dark, the defendant, Scott, Hampton, Reed, Hutchinson and others were standing in front of the home of an individual known as "Popeye" who lived near Hutchinson. The defendant was wearing a pinkish dress shirt and slacks. Since this was not his normal type of clothing, Scott believed the defendant had come from some event or special occasion earlier in the evening. The men were passing the time gambling by shooting dice.

When the defendant lost all of his money, Scott heard him say that he needed to obtain more money and that he was going to rob someone. At that time, a red car which was unfamiliar to Scott, came from the direction of Highway 43 onto McCarroll Street where the men were. Scott said they could not see who was in the car but the defendant said that if the car passed by again, he would rob whoever was in the car.

Approximately 15-20 minutes later, as Walber driving the red car was returning from his pizza delivery, he drove back by the group of men. Hutchinson flagged Walber down by standing in front of the car on the street. The defendant ran up to the driver's side and hit Walber three times in the face through the open driver's side window. The defendant and Hutchinson opened the driver's door and pulled Walber out of the car and started beating Walber in the face outside of the car. The defendant took a black wallet and ring from the victim. Scott described the victim as wearing blue jean shorts.

The defendant told Scott, Reed, and Hampton to take a ride with him to get some marijuana. Hutchinson pushed Walber through the passenger door and into the hatchback of the car. With the defendant driving, Scott in the front passenger seat and Hampton, Hutchinson and Reed in the back seat, the men drove approximately 2-3 minutes and parked the car on a gravel road off of nearby Presbyterian Road in Springfield, Louisiana, near a church and a graveyard. According to Scott, there was no discussion where they would go as the defendant, who was driving, simply stopped at this location.

The men exited the vehicle and Hutchinson pulled the victim from the hatchback onto the little gravel road. Hutchinson began to beat Walber with a black, shiny stick that Scott had not seen before the men got into the car. The defendant hit the victim in the face with his hands while Scott, Hampton and Reed stood by. The beating continued for 15-20 minutes, with the victim ultimately on his knees in front of the car's headlights, until the defendant stated that it was time to go.

The men re-entered the vehicle with the defendant driving, Scott in the passenger seat and Hampton, Hutchinson and Reed in the backseat. Once again

Hutchinson had pushed the victim into the hatchback. Scott stated that the victim was making moaning sounds but that he could not understand what he was trying to say. Once again, there was no discussion as to their destination. The defendant drove on Highway 43 going back toward McCarroll Street.

About 2-3 minutes later, the defendant stopped the car in an area of an abandoned house off of Highway 43. The victim was again removed from the car by Hutchinson through the passenger side and beaten with the stick. The victim, who was bleeding and lying on the ground, attempted to crawl away but was unable to do so because Hutchinson prevented his escape. None of the other men attempted to help the victim but Hampton stated that he was going to leave. The defendant told Hampton that no one was going to leave.

After 15-20 minutes, the defendant announced they were leaving and the men returned to the car. With the defendant driving, the men traveled farther down Highway 43 toward Albany. The defendant saw a car he recognized and flashed his lights. The defendant then pulled the red car into the parking lot of a convenience store called The Potluck.

Eric Charles Brown was driving the other vehicle with James Skinner as his passenger. Brown turned around and joined the defendant at The Potluck after the defendant flashed his lights at him. The defendant left the car and walked up to the driver's side of the other vehicle to speak to Brown. Skinner got out of Brown's car and approached the red car to ask Scott and Hampton if they had any marijuana. When they told him they did not, Skinner walked back to Brown's car and spoke to the defendant. Scott did not hear the defendant's conversation with either Brown or Skinner. While the car was parked, Hampton leaned his head out and asked Brown for a ride home; Brown refused.

After their conversation was completed, the defendant and Skinner walked back to the red car. With Skinner driving, the defendant moved to the front passenger seat with Scott sitting on the console between them. Hampton was seated in the backseat behind the driver and Reed was in the backseat behind the front passenger. Hutchinson was in the hatchback with the victim. According to Scott, they were "like sardines in a can."

Skinner drove the car to the gymnasium of the abandoned Springfield Junior High School. Brown followed in his own car. At that location, everyone got out of the vehicles. Hutchinson removed the victim through the passenger door.

Because Brown had refused to give Hampton a ride home, Brown and Hampton got into a fight. Brown punched Hampton in the face between the eyes above his nose three times.[5] [Fn. 5 The state presented evidence that on April 21, 1998, the Livingston Parish Sheriff's Department arrested Hampton on an unrelated charge and took a picture of him. That picture shows a little healed-over area of skin between his eyes, just above his nose.] Meanwhile, Hutchinson continued to beat Walber on the ground in front of Walber's car. The defendant and Skinner talked while Reed and Scott stood there.

After Brown and Hampton's fistfight, the men all returned to their vehicles and sat in the same positions as before and drove off again. Instead of trying to push the victim into the car through the passenger door, however, Hutchinson put the victim into the hatchback through the hatchback door.

Skinner drove the red car to Crisp Road in Tangipahoa Parish. According to Scott, all of the prior activity had occurred at locations in Livingston Parish. The badly beaten Walber was taken out of the hatchback by Hutchinson. All of the men exited their vehicles. Brown stayed at that location for a few minutes but left in his own car after telling Skinner he would see him later. According to Scott, the victim could not say anything that anyone could understand.

After Brown left, Hutchinson and Weary took the victim to the middle of the gravel road, each holding up one of the victim's sides. Skinner got back in the car and drove the car a little way up the road and revved the engine. Accelerating, Skinner drove the car toward the men in the street. The defendant and Hutchinson let go of the victim and Skinner hit the victim with the car. Skinner turned the car around and ran over the victim again, who was now lying on the ground. Skinner then backed up over the victim's body. According to Scott, the victim did not move after being hit by the car. The defendant and Skinner moved the victim's body to the side of the road, leaving the victim lying face down.

The men returned to Springfield to Melvin Tillman's house. There, Scott saw Tillman and Ricky Color from a distance. Scott, Reed and Hampton got out of the car and Scott walked home. Scott admitted he had smoked marijuana that night.

While in the car, Scott saw a Scrabble board game, a hand-held electronic poker game, a deck of cards and a portable CD player. Scott saw new car speakers, a school backpack and a smaller travel bag. In the backpack were Girbaud blue jeans and a Tommy Hilfiger shirt. According to Scott, Hutchinson took the shirt and the defendant had the victim's school ring. In addition, the defendant took the money from the victim's tri-fold black wallet. Scott maintained that he did not receive anything from the victim's car or person.

Scott claims he saw the red car the next day driven by the defendant with Hampton as passenger, but claims he did not talk to them. A day or so after that, Scott and his passenger Robert Brewer saw the red car again being driven by the defendant. At that time, Scott stopped his car and Brewer talked with the defendant.

Scott admitted he did not tell the authorities the whole story the first time, nor on the subsequent times that he spoke with them. In fact, in his first statement, he did not even admit to being present but told authorities that someone had told him the facts. At the time of the defendant's trial, Scott was serving his five year sentence, as he had not been able to participate in the boot camp program due to the need for his presence in Livingston Parish during the investigation of this case. In exchange for his testimony, Scott was offered a deal to plead to manslaughter for his role in the Walber murder and to receive a sentence of 10 years, to be served concurrently with the sentence he was presently serving.

Eric Charles Brown's Testimony

Eric Charles Brown testified that he and James Skinner were hanging out, selling drugs and drinking on the evening of April 4, 1998. After receiving a call to deliver some drugs, Brown and Skinner drove in Brown's car, which was well-known in the neighborhood. Brown, the driver, saw someone blinking his lights at him as he drove down Highway 43 and pulled into the parking lot of The Potluck

convenience store. The defendant, who had blinked his lights at Brown, got out of the small red car he was driving and came over to talk to Brown. Brown could see other people in the red car but had never seen the car before. The defendant asked Brown if Brown had a gun. When Brown replied that he did not, the defendant asked Skinner the same question. Skinner replied that he had a gun on him. Skinner and the defendant then walked to the back of Brown's vehicle to talk.

According to Brown, and contrary to Scott's assertion, Skinner got back in Brown's car and told Brown to follow the defendant after the defendant and Skinner finished their conversation. Driving his car, Brown followed the defendant driving the little red car to Presbyterian Road. When they exited the red car, Brown observed Hampton, Hutchinson, Reed, Scott, and the defendant, all of whom were well known to him. In addition, Brown saw "a little white guy" with them.

Hampton asked Brown for a ride home but the defendant told Brown to refuse. Brown knew the defendant better, so he told Hampton he would not give him a ride. Brown got into a fight with Hampton during which he punched Hampton in the face two or three times. Brown was not paying attention to anything else that was occurring. He was at this location only 5-6 minutes, because the defendant told Brown the defendant was trying to take care of some business and that they should all leave.

Brown did not know what the defendant meant by this statement, but got back in his car with Skinner and followed the defendant again. According to Brown, the defendant was in charge of what was occurring. Brown told Skinner that he did not want to be involved with whatever was going on. Skinner told Brown he wanted to get in the car with the defendant because the defendant had borrowed his gun. Brown then flicked his lights at the defendant, who was preceding him, and the defendant turned onto Crisp Road.

As Skinner exited Brown's vehicle, Brown asked Skinner if he was going to stay with the defendant and the others. Skinner said that he was. Brown saw the men getting out of the red car, including the victim being removed from the hatchback. Brown had eye contact with the victim and turned his head, not saying anything.

Brown left the area and drove to Springfield to complete his drug transaction. He saw the red car again at a stop sign as he was returning, but did not stop. He later heard on television that a young man was killed and realized that the victim was the young man he had seen with his friends and that the murder must have occurred after he left. However, he did not say anything to authorities at that time.

A few days after the murder, the defendant asked Brown for $300 because he had "to blaze for a minute." Brown understood this to mean that the defendant was going to leave town.

Brown was in jail at the time he testified at the defendant's trial. He had a 1991 prior drug conviction and a 1999 conviction for attempted distribution of cocaine, for which he was serving a 15 year sentence. He admitted he did not talk to police about what he knew until he was arrested on his current charges. Brown admitted that his testimony at trial was not the same story that he initially told police. He claimed that he received no deal in exchange for his testimony,

although he acknowledged that his sentencing exposure was much greater for the two counts he had been facing, that the sentences could have been set to run consecutively, and that he could have been billed as an habitual offender and was not. Additionally, Brown admitted he was arrested for aggravated kidnapping, car-jacking and armed robbery in connection with Walber's murder, but that he was not charged with any of these offenses. He also acknowledged that he was caught with a handcuff key while in prison but was not prosecuted for that offense.

Melvin Tillman's Testimony

Melvin Tillman was one of the persons who gave authorities information during their initial investigation. Tillman contacted Livingston Parish authorities when it became known that they were looking for information on the victim's red car. Tillman told Detective Kearney Foster of the Livingston Parish Sheriff's Department that on the evening of April 4, 1998, he and Ricky Color were together smoking crack cocaine. He claimed that he was no longer under the effect of that drug when he saw the defendant, known to him as Mike-Mike, in a small reddish car. Tillman saw the defendant on McCarroll Road approximately 50 yards from Hutchinson's house. He described that Hampton was driving the car with someone named Terrell, now deceased, and Reed was sitting in the passenger side. Tillman claimed that the defendant was sitting in the back seat with Larry Norman, Dartania Tillman and another individual he did not know.

Tillman noticed the car was covered with blood and that the passenger side light was hanging out. When Tillman commented on the condition of the car, the occupants told him they had hit a dog and had to run over it a few times in order to kill it. Subsequently, the defendant left the car and asked Tillman for a ride to Albany. The defendant also asked Tillman if he wanted to buy an Albany High School class ring, which Tillman declined.

Either the next night or a few nights later, Tillman again saw the red car at his house. This time, Reed and Hampton were in the car. Tillman told them they needed to do something about all of the blood in the car because the car was starting to smell. Tillman has prior convictions for both possession and distribution of drugs, as well as misdemeanor theft.

Robert Brewer's Testimony

Robert Brewer knew all of the individuals named by Scott and Brown for many years. Brewer claimed he saw the little red car on April 4, 1998 at approximately 7-7:30 p.m.[6] [Fn. 6 Brewer named this date a Friday, not a Saturday as was established by all the other witnesses, but later stated he was not sure about dates.] He saw the car later when he was out riding with Scott. When he saw the defendant driving the red car, he asked Scott what the defendant was doing with the car and Scott said he did not know. Subsequently, the defendant asked Brewer if he wanted to buy some brand new speakers. Brewer saw the defendant with the red car again a few days later.

Brewer had a prior 1989 conviction for theft and a 1994 conviction for distribution of cocaine. Brewer indicated that he and Scott used to "hang together" and both sold drugs, as did Melvin Tillman.

Jeffrey Ashton's Testimony

On April 4, 1998, Jeffrey Ashton was 10 years old and lived close to McCarroll Road. At approximately 11:20 p.m., he was walking home from a music program at the church across the street from his family's trailer when he heard footsteps. He ran and hid under his family's trailer. From that vantage point, he saw the defendant, Hutchinson and Hampton, whom he knew from the neighborhood. Ashton watched as the defendant threw something silver into a ditch. He then saw the three men get back into a red car. The next day, Ashton rode his bike to the ditch and found a Tommy Hilfiger cologne bottle. Ashton saw the car frequently the next day being driven by Hutchinson, Reed, the defendant, and someone else whom Ashton did not know. Ashton never saw Scott in the red car. Later that afternoon, he saw someone throw a black triangle or square from the car. Although he searched for that object, he did not find it.[7] [Fn. 7 The man who cut grass for the church found a dark black, tri-fold wallet which contained the driver's license of a 16 or 17 year old white boy in the grass of the church across from the Ashton's property. The wallet did not contain any money.]

Ashton told a teacher about what he had seen but claimed that someone else had told him the information. He initially talked to police but did not tell them what he knew. Not until Ashton was under house arrest for a juvenile offense of simple battery did he tell the police what he had seen. Ashton admitted that he plays with Scott's brother in the neighborhood where they all live.

Defendant's Alibi Testimony

The defendant claimed that he had no involvement with Walber's murder, asserting that he was out of town in Baton Rouge at a wedding at the time that the murder occurred. At his trial, the defendant presented the testimony of his girlfriend, Renarda Dominick, her aunt, Darlene Johnson, and her sister, Kimberly Dominick Armstrong, to state that the defendant was attending a wedding reception until 9 or 9:30 p.m. in Baton Rouge. According to these witnesses, the defendant did not return to Springfield until well after 10 or 10:30 p.m., after Walber's body had been discovered.

However, the state presented evidence that the warden of the Tangipahoa Parish jail and two other deputies overheard the defendant as he was speaking to his father after he had been arrested and charged. Weary was overheard to say that he did not understand why he was in jail for the murder, as he was just an innocent bystander. Thus, Weary placed himself at the scene of the crime.

State's Rebuttal Testimony

To rebut the defendant's evidence of alibi, the state presented the testimony of Rene' Helm, the bride at whose wedding the defendant was in attendance on April 4, 1998. According to Ms. Helm, her wedding began at 4 p.m. that afternoon and her reception began at 6 p.m. Although she and her husband rented the reception hall from 6 to 9 p.m., they did not use the hall for the entire time. She and her husband were the last to leave the reception between 8:30 p.m. and 8:45 p.m. While she had seen the defendant at her reception, she did not see him or his girlfriend when she left, so assumed he had left earlier.

After considering all of the evidence presented, the jury unanimously found the defendant guilty of first degree murder. *State v. Weary*, 2003-3067 (La. 4/24/06), 931 So.2d 297, 302-09.

REASONS FOR DENYING THE WRIT

As will be seen, exercise of this Honorable Court's discretionary jurisdiction is unnecessary on the facts of this case. Petitioner has mischaracterized this case by ignoring or overlooking critical trial evidence, mischaracterizing the evidence presented at the trial by assuming the state witnesses were lying, mischaracterizing the evidence presented at the post conviction relief hearing by assuming the petitioner's witnesses were truthful, and ignoring the fact that the jury and trial court judge must determine witness credibility when making their decisions.

I. The recitation of the facts by the Louisiana Supreme Court above, while thorough, fails to include several important facts which will be detailed here as they bear on petitioner's ability to carry his burden of proving violation of his Constitutional rights.

A. Sam Scott

For instance, when Sam Scott testified at the several trials in this and the companion cases, he specified that on the night of the murder Weary was dressed nicely in a reddish pink dress shirt and black slacks, which clothing were not something Weary would normally wear. Also, while Scott was initially participating in the "Impact Program" at Hunt's Correctional Center, his speaking with police and implicating himself in this crime disqualified him from that program and he was not released pursuant to the program guidelines of 180 days of intensive incarceration and then early parole. Ironically Scott's name had never been mentioned in connection with the Walber murder.

Prior to Scott testifying at Weary's trial, Scott's lawyer negotiated a deal in which Scott would plead to manslaughter and receive a ten year sentence. This fact was made known to the jury. Scott and Brown also testified in all of the other defendants' trials.

B. Shadrick Reed

After being arrested, Shadrick Reed confessed to law enforcement, implicating himself in Walber's murder along with petitioner, James Skinner, Randy Hutchinson, Daryl Hampton, Sam

Scott and Eric Charles Brown. Petitioner, Skinner, and Hutchinson were indicted by a Livingston Parish grand jury for first degree murder. Reed and Hampton were indicted for second degree murder. The grand jury declined to indict Brown.

C. Eric Tillman

According to Tillman, when he asked Reed and Hampton about the blood on the outside of the little red car, they laughingly said they had run over a dog, "a big dog like a St. Bernard." Tillman said he encountered the group again a short time later. This time Weary asked Tillman if Tillman wanted to buy an Albany class ring. Tillman declined. Weary did not graduate from Albany High School.

D. Petitioner's admission to his father

The conversation with his father in which petitioner told his father he did not understand why he was in jail as he was just a bystander occurred immediately after bond was set and he was allowed to make a phone call.

II. Exercise of this Honorable Court's discretionary jurisdiction is unnecessary since the Louisiana courts did not err in denying post conviction relief on the basis of petitioner's Brady v. Maryland.

Exercise of this Honorable Court's discretionary jurisdiction is unnecessary since the Louisiana courts did not err in denying post conviction relief on the basis of petitioner's *Brady v. Maryland*. The information cannot be considered material under this Honorable Court's definition of materiality and petitioner did not show that, in conjunction with the trial evidence that has been ignored or overlooked by petitioner, the information would have changed the outcome of this trial.

The holding in *Brady*, requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or to punishment." *Brady*, 373 U.S. at 87, see also *Moore v. Illinois*, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972). This Court further explained that

requiring materiality shows concern that the suppressed evidence might affect the outcome of the trial. *U. S. v. Agurs,* 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976).This Court has stated that materiality requires showing a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481.

A. Randy Hutchinson's medical records.

Regarding these allegations, the trial court stated in its written reasons "even in the event that the fact of non-disclosure itself may be classified as a violation, none of the evidence, identified, in the event that it had been effectively utilized by the defense counsel at trial, produces a reasonable probability that the defendant would have been aquitted." (Appendix B-6) The trial court went on to say, "...Randy Hutchinson's medical records do not show that he could not have participated in the crime by virtue of his physical condition. To the contrary, Hutchinson's medical records indicate that he was not compliant with the limitations on physical activity prescribed by his treating physician." (Appendix B-6)

At the post conviction relief hearing, petitioner called an orthopedic surgeon, Dr. Paul Dworak. His main purpose was to use Randy Hutchinson's medical records to counter Sam Scott's testimony of Hutchinson's involvement in the murder in an attempt to undermine Scott's credibility. Dr. Dworak claimed that Hutchinson could not have acted as Scott testified because the murder occurred eight days after Hutchinson had knee surgery. According to Dr. Dworak, it "usually" takes 6 weeks to heal and that if two days after surgery one bent the knee at a 90 degree flexation (as if sitting in a chair) he would have a "high probability of pulling the whole thing apart." Dr. Dworak concluded that Hutchinson's repair would have failed if he acted as Sam Scott testified.

However, Dr. Dworak admitted on cross examination that according to the medical records on April 3, 1998 (the day before the murder) Hutchinson was non-compliant with his treatment and Hutchinson was not wearing his splint or crutches, but that the repair was not disrupted. The medical records show that Hutchinson's Doctor noted a month after the murder on May 5, 1998 that Hutchinson had "good flexation (100%)[,]" the tendon was "healing nicely[,]" and that the internal wire was broken but the sutures were not. Dr. Dworak admitted on cross examination that Hutchinson would be able to walk if the wire was broken.

The State's orthopedic surgeon, Dr. Kinnet, testified on August 20, 2012 and his testimony appears in the transcript from that date on pages 73-109. Dr. Kinnet also noted that the April 3, 1998 medical records indicate that Hutchinson was not wearing his splint or crutches. He opined that t was significant because if the corresponding pain was acceptable to Hutchinson then Hutchinson could walk and move. Dr. Kinnet indicated that often patients, especially young patients, are often not compliant and that biological factors affect a patient's rate of healing.

In contrast to Dr. Dworak, Dr. Kinnet opined that Hutchinson could act as Sam Scott testified. He based this opinion on the April 3, 1998 medical records and the type of repair made. The post surgery repaired knee would be "far stronger than before." In fact, this was the function of the repair. Dr. Kinnet did admit that the actions of Hutchinson as testified to by Sam Scott put his repair at risk. However, Dr. Kinnet stated that if Hutchinson tore the wire but not the sutures, or the sutures but not the wire, then he could stand.

More specifically, Dr. Kinnet stated that the wire would rupture because of being fatigued, which he described as being repeatedly bent, like a wire hanger. Because of this, a rupture of the wire shows fatigue of that wire but necessarily also shows motion of the knee which indicates that healing is taking place. One must recall that the medical records show that Hutchinson had torn the wire but not the sutures.

As said above, the medical records show that Hutchinson was non-compliant with his treatment. In other words, Hutchinson was not using crutches and the knee brace as directed. The records show that Hutchinson was ambulatory at his initial checkup following surgery and that he missed a follow up appointment within a week of this murder. Petitioner's expert, Dr. Dworak, based his opinions on what generally occurs with patients after this surgery. As he admitted on cross-examination, each patient is different and heals in varying degrees.

Although Weary's expert, Dr. Dworak, states that Hutchinson could not have acted as Sam Scott testified, that ultimate opinion is not credible given the admissions he made on cross examination. His testimony regarding the evidence shown in the medical records, and the effect non-compliance with treatment has on a repair such as Hutchinson's. Given the admissions, the jury would not possibly have accepted Dr. Dworak's ultimate opinion and found Sam Scott's testimony to be fantastic.

Furthermore, how the testimony of an expert would have impacted the jury must be viewed in light of the other trial testimony. For instance, at the trial Sam Scott and Eric Charles Brown both testified that Randy Hutchinson was injured and limping. Jeffrey Ashton also testified he saw petitioner driving Eric Walber's car the day after the murder, and that he saw petitioner, Hutchinson, and Darrell Hampton get into the red car after petitioner threw the cologne bottle into the ditch. Deputies testified that immediately after bond was set, petitioner called his father in California and said that he was just a bystander.

In order to believe Dr. Dworak's ultimate opinion that Hutchinson couldn't walk or bend his knee, the jury would have had to disregard all the other evidence presented at the trial. Such a conclusion is absurd and therefore, this evidence cannot be said to undermine confidence in the jury's verdict.

B. Eric Charles Brown's testimony.

The information presented by petitioner at the post conviction relief hearing merely shows that at some point Brown sought a deal with the State in exchange for his testimony. The fact that Brown may have sought consideration is irrelevant under the law. While the courts have never limited a *Brady* violation to cases where the facts demonstrate that the state and the witness have reached a bona fide, enforceable deal that remained undisclosed and "evidence of any understanding or agreement as to a future prosecution would be relevant to [the witness's] credibility[]",*Giglio v. United States*, 405 U.S. 150, 155 (1972), the main question is "the extent to which the testimony misled the jury, not whether the promise was indeed a promise ...." *LaCaze v. Warden LCIW*, 645 F.3d 728, 735 (5th Cir. 2011). "In *Napue v. Illinois*, 360 U.S. 264 (1959), [this Court] explained that the key question is...whether the witness "might have believed that [the state] was in a position to implement ... any promise of consideration." *Id.* (emphasis added), citing *Giglio*; and citing *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008).

In other words, the question is whether the witness believed he had been promised or was likely to receive some consideration for his testimony. Here, Eric Charles Brown unequivocably testified at Weary's trial that he had received no "deal" in exchange for his testimony. His answer to this line of inquiry clearly shows his perception as to whether he had any inducements to testify. The fact that he or his attorney initially asked for consideration is therefore irrelevant and under the above case law can hardly be considered *Brady* evidence.

Furthermore, the documents admitted at the post conviction relief hearing in which Brown or his attorney asked for consideration on other charges does not force the conclusion that Brown's motives for testifying were other than what he told the jury. Without being given consideration, Brown testified anyway because he felt the family deserved to know what happened because Walber was nice to his little sister.

C. Sam Scott

It should first be noted that the argument made by petitioner regarding the statement by Reggie Jackson to this Honorable Court is not the same as that made to the trial court, who issued the last reasoned decision on this application for post conviction relief. There, petitioner pointed to the statements given by a Reggie Jackson and a Kedrick Johnson in an attempt to show that the State withheld evidence showing that Sam Scott *manipulated the system* thereby attempting to case doubt on his credibility. These statements appear as petitioner's post conviction relief exhibits 27 and 28.

Jackson's statement was specifically argued on post conviction relief in an attempt to show that Scott was untruthful when he testified to the jury about an affidavit Scott had signed while in prison and that was used by defense counsel trying to impeach his testimony. Reggie Jackson's statement was taken on March 5, 2002. This was the day before the jury recommended the death penalty for petitioner. In other words, this statement was taken when the trial was nearly completed, after Scott had testified at petitioner's trial, was cross-examined, and was made to read the affidavit while on the witness stand. This statement was probably was never seen by anyone involved with the actual trial until after it was over, it at all.

The State argued to the trial court on post conviction relief that even if Jackson's statement is true, which was not shown at the post conviction relief hearing, it did not necessarily contradict Scott's trial testimony. This is because Scott did not actually testify at trial that he did not know what the affidavit said. Scott merely asserted that he did not read the affidavit before he signed it. While this may seem like a small and insignificant difference, when one takes into account that the entirety of Scott's cross-examination it is apparent that he was repeatedly asked the same detailed questions about his previous lies and that Scott obviously did not wish to

answer those questions. It is not surprising that Scott gave minimal information in reference to the affidavit.

The statement petitioner purportedly by Kedrick Johnson appears in petitioner's post conviction relief exhibit 27. This is actually a supplemental report dated May 17, 2000 in which Detective Murphy Martin documents that Johnson claimed to have lied to police the day before and claimed that Sam Scott told him what to say because it would help him get out of jail. Since the report states that Chief Foster contacted Murphy Martin to say that Johnson wished to speak with him, one can see that this conversation took place at the Livingston Parish Jail. Testimony at this trial, and common experience of those who work in the criminal justice field, shows that an inmate who provides information to police is not well received in the prison system. According to the trial testimony, by the time Johnson made this statement, it was known within the prison system that Sam Scott was informing the police on the Eric Walber murder.

Regardless, like with Eric Charles Brown, under the law it does not matter if Sam Scott believed that informing could get him out of jail when he first began his endeavors. What matters is whether Scott received consideration from the prosecution (or believed he would) in exchange for his testimony and if so, whether that consideration was disclosed to the defense. In this case, Scott did receive consideration and it was disclosed. Scott's trial testimony makes it clear that he was being allowed the opportunity to plead guilty to lesser charges and a ten year sentence in exchange for his testimony. It was also made abundantly clear on both direct and cross examinations that Scott had lied to police numerous times.

Like with Eric Charles Brown, under the law it is irrelevant that Scott may have tried to get a better "deal" or whether he told with other inmates that information on this murder may help them too. The legal burden on a claim that a *Brady* violation occurred requires that petitioner show that this information is material to issue of guilt or innocence or that jury would

likely have chosen a different verdict if presented with the information. Petitioner failed to meet that burden at the post conviction relief hearing and ought not now be allowed to change his argument regarding the alleged importance of these statements.

D. Rene Helm statement

Petitioner claimed on post conviction relief and claims here that the statement to police by Rene Helm is inconsistent with her trial testimony, could have been used for impeachment, and ought to have been disclosed.

First, petitioner was aware that Rene Helm was a potential alibi witness and his trial counsel actually had asked his investigator to speak with her in preparation for trial. Because of this, petitioner can hardly claim that he was prejudiced by the State's failure to disclose a potential alibi witness of whom he was already aware and interviewed. The same is true for the statements given to police by Renarda Dominick, Kim Armstrong, and Darlene Johnson as well as the existence of the groom, Ed Helm.

Additionally, post conviction counsel entered into evidence at the hearing a statement given to police by Rene Helm. When counsel questioned the prosecutor, Charlotte Herbert, post conviction counsel stated that Helm's trial testimony was that she and her new husband were the last to leave the reception. Herbert agreed that the statement to police was different from what counsel had stated in that the statement to police stated other persons were there when Helm left the reception. Counsel had a similar conversation with Corbit Ourso.

The fact is counsel completely mischaracterized Helm's trial testimony when questioning the prosecutor and defense trial counsel at the post conviction relief hearing. When one reviews the actual trial transcripts, it is apparent that Helm did not maintain at the trial that she was the last to leave the reception and stated others were there. (Weary Trial Trans. pp. 2289-90)

Second, Rene Helm's statement to police was not actually inconsistent with her trial testimony. In the police statement, Helm stated she had rented the hall from 6:00 to 9:00 pm but left before their time was completed, that she and her husband left between 8:30 and 9:00 pm, that other people were still present and cleaning up when she left, the disc jockey was no longer playing, and that she saw Weary at the reception but did not know for sure if he was there when he left. (Weary PCR exhibit 40) At trial, Helm testified that the reception began at 6:00 pm, they did not use all the time that the hall was rented, she left between 8:30 and 8:45 pm, that other people were still present and cleaning up when she left, she saw Weary at the reception, she did not see Weary when she left and assumed he was gone, she had no idea what time Weary left the reception. (Weary Trial Trans. pp. 2288-90) The only information from her trial testimony that is not contained in her statement is that she assumed Weary had left before her since she did not see him, but Helm qualified this by saying that she had no idea what time Weary left.

On this issue, the trial court stated in its Reasons for Judgment on the post conviction relief that:

> ...Ms. Helm's statement regarding the possible time of the applicant's departure from the wedding reception differs very little from her testimony at trial. In both her statement to police and her trial testimony, she indicated that she was not certain of the applicant's time of departure. In both accounts, Ms. Helm approximated that she left the reception between 8:30 and 9:00 p.m. In her statement, Ms. Helm indicated that she was not sure whether the applicant was still present at the reception when she left; at trail, Ms. Helm testified that she had not seen the applicant at the time that she left and had assumed that he was gone.
>
> Ms. Helm's uncertainty as to the time of the defendant's departure was consistent with the accounts of other witnesses called by defense counsel at trial. Additionally, because Ms. Helm's statement would not have been appreciably inconsistent with her trial testimony, it would not have been an effective method of impeaching her testimony. As such, her statement cannot be properly classified as "material" in a Brady analysis, nor can it be said to produce a reasonably probability of acquittal. (Appendix B-7)

Since Rene Helm's statement to police is not different than her trial testimony, it is likewise not exculpatory or usable for impeachment and the prosecution is under no duty to

disclose that information. Since there was no duty to disclose, no *Brady* violation can have occurred. In fact, Rene Helm's trial testimony was such that Weary's appellate counsel argued that it was exculpatory and should have been disclosed. Trial counsel likely thought so as well. Regardless, petitioner cannot and did not show that use of this information would have led to a different outcome in his trial.

III. Exercise of this Honorable Court's discretionary jurisdiction is unnecessary since the Louisiana courts did not err in denying post conviction relief on the basis of petitioner's Strickland v. Washington allegations. Petitioner failed to prove that his counsel's performance was so deficient that, considering the trial evidence that has been ignored or overlooked by petitioner, that confidence in outcome of this trial is necessarily undermined or the outcome of the trial would have been different.

Exercise of this Honorable Court's discretionary jurisdiction is unnecessary since the Louisiana courts did not err in denying post conviction relief on the basis of petitioner's Strickland v. Washington allegations. Petitioner failed to prove that his counsel's performance was so deficient that, considering the trial evidence that has been ignored or overlooked by petitioner, that confidence in outcome of this trial is necessarily undermined or the outcome of the trial would have been different.

The standard for judging trial counsel's performance was established by this Honorable Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, this Court established a two-part test in which the petitioner must prove deficient performance and prejudice therefrom. See *Strickland*, 466 U.S. at 697. To prevail on the deficiency prong, Skinner must demonstrate that his counsel's conduct failed to meet the constitutional minimum guaranteed by the Sixth Amendment. "The [petitioner] must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Any analysis of trial counsel's performance must also take into account the reasonableness of counsel's actions in light of all of

the circumstances. See *Strickland*, 466 U.S. at 689. "[I]t is necessary to 'judge . . . counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" *Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993) (quoting *Strickland*, 466 U.S. at 690).

In order to prove prejudice, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Furthermore, "[t]o meet the prejudice prong, the [petitioner] must affirmatively prove, and not merely allege, prejudice." *DeVille v. Whitley*, 21 F.3d 654, 659 (USCA5 1994); *Theriot v. Whitley*, 18 F.3d 311, 314-15 (USCA5 1994). In this context, a reasonable probability of prejudice is "a probability sufficient to undermine confidence in the outcome." *Id.* In making a determination as to whether prejudice occurred, federal courts review the record to determine the relative role that the alleged trial errors played in the total context of the trial.

"...[I]t is not enough, under Strickland, 'that the errors had some conceivable effect on the outcome of the proceeding.'" *Motleyv. Collins*, 18 F.3d 1223, 1226 (USCA5 1994) (quoting *Strickland*, 466 U.S. at 693). Thus conclusory allegations of ineffective assistance of counsel, with no showing of effect on the proceedings, do not raise a constitutional issue sufficient to support federal habeas relief. *Miller v. Johnson*, 200 F.3d 274, 282 (USCA5 2000) (citing *Ross v. Estelle*, 694 F.2d 1008, 1012 (USCA5 1983)), cert. denied, 531 U.S. 849 (2000).

... On this issue the trial court made very specific findings which will be discussed below.

A. Sam Scott

At the post conviction relief hearing, post conviction counsel called Lakendrick Scott (Sam Scott's brother) and Doris Dantzler-Scott (Lakendrick's wife) who testified that Sam Scott was at the Ponchatoula Strawberry Festival the night and time that Eric Walber was murdered. The argument is that Sam Scott could not have witnessed or participated in the murder.

Doris testified that she saw Lakendrick at about 7:00 pm at the Strawberry Festival and was with him for 45 minutes to an hour before she left. She later picked Lakendrick up between 10:00 and 11:00 pm. Doris never came forward even though Lakendrick is Sam Scott's brother. (See generally, Trans. 8-12-2012 pp. 38-45) Lakendrick testified that he and Sam Scott went to the Strawberry Festival on 4-4-1998, the night Eric Walber was murdered. Lakendrick claims that he and Sam met with Doris and her friend while talking to Shadrick Reed, Darryl Hutchinson, and 2 others about 10 to 15 minutes after arriving. Lakendrick testified that he and Sam were there until Sam's girlfriend got off work "around 10 or 11" and that they were together the entire time. Lakendrick testified that Sam dropped him off in Springfield "around midnight"; contrary to Doris who testified she picked Lakendrick up between 10 and 11 pm. (Trans. 8-13-2012 pp. 26, 41)

On cross examination, Lakendrick admitted that he did speak with someone about the Strawberry Festival after Sam was arrested but before the trials. He thought this person was an investigator, not law enforcement, did not remember the exact time, but he recalled that they spoke at his mother's home. Lakendrick did not reach out to the District Attorney's Office or law enforcement. Despite stating he told an investigator that Sam was at the Strawberry Festival and not with Weary, on cross examination Lakendrick claimed that he did not talk before trial because he was protecting his mother and Sam. Lakendrick also stated that he joined the army in 2001 because he felt he had to leave since his mother and Sam were receiving death threats. (See generally, Trans. 8-13-2012 pp. 17-38)

Yet again, in order to believe the testimony of Doris and Lakendrick Scott, the jury would have had to disregard not just Sam Scott's testimony, but that of the other witnesses including (1) Eric Charles Brown (whose testimony was consistent with Sam Scott's), (2) Jeffrey Ashton who saw petitioner driving Walber's car and throw a bottle of the cologne that was taken

from Walber, (3) Ronnie Pinion and Charles Burise who testified they heard Michael Weary on the telephone from jail tell his father that he was a bystander and did not kill Walber, (4) Melvin Tillman who testified he saw petitioner driving a bloody red car and to whom petitioner tried to sell an Albany class ring, and (4) Robert Brewer who testified he saw petitioner in a red car and to whom petitioner attempted to sell car stereo speakers like those taken from Walber.

No rational jury would disregard all of that evidence in favor or Lakendrick and Doris' inconsistent testimony and therefore, the post conviction hearing evidence cannot be said to undermine confidence in the jury's verdict. Because of this, it cannot be said that the Louisiana courts erred in denying post conviction relief.

B. Randy Hutchinson

Regarding the medical records of Randy Hutchinson, Petitioner argues that his trial counsel was ineffective for failing to uncover the information. The lack of importance of these records is discussed above and for the sake of efficiency respondent hereby incorporates that argument here.

C. Forensic experts

In addition, petitioner claims that his trial counsel should have employed forensic experts to show the jury that Scott's account of how Walber was murdered was not true and points to the testimony by Leroy Riddick at the post conviction relief hearing. In his affidavit and at the post conviction relief hearing, Dr. Riddick opined that the trial evidence does not show evidence that Eric Walber was run over by his vehicle three times.

Post conviction counsel further allege that Corbit Ourso was ineffective because he did not hire or consult with a forensic pathologist or orthopedic surgeon. As became clear in the post conviction relief hearing, the forensic pathologist secured by post conviction counsel could not

have swayed this jury. Dr. Riddick testified on August 16, 2013 and his testimony appears in the transcript from that date on pages 485 through 508. Though he tried his best to discredit Sam Scott and the State's forensic pathologist, Dr. Mackenzie (who conducted the autopsy and testified at trial), Dr. Riddick ultimately concurred with the cause and manner of death and made admissions made at the hearing that show Scott's account is entirely plausible.

Essentially, the injuries on Walber's body indicate he was hit by a car. Dr. Riddick did not contest this. The blood evidence admitted at trial shows that Walber was hit with both the front and rear bumpers of his vehicle. This could not occur if Riddick's opinion that Walber was not hit multiple times is correct.

Dr. Riddick also concurred with much of the autopsy report and Dr. Mackenzie's trial testimony. For example, Dr. Riddick admitted that Eric Walber suffered "road rash" from his body being moved across a surface and that this is consistent with a pedestrian being hit by a car and that blood existed on both the front and rear bumper of the car, that the blood on the front bumper was consistent with hitting Walber's head, and that at some point Walber was under the car.

Also, since his affidavit stated Walber suffered injuries from the undercarriage of the car, Dr. Riddick reluctantly admitted on cross examination that some portion of the car must have gone over Walber's body. Dr. Riddick further admitted on cross examination that although his affidavit stated the car was not "revved up" that he really had no way to know from the evidence whether the car was "revved up" when it hit Walber. Dr. Riddick stated very clearly on direct and cross examination that his opinion was that Walber was not run over by the wheels of a vehicle three times and that the car was not "burning rubber." If a car were burning rubber, he opined, then the tires will peel the skin and transfer rubber to the body; since that injury did not occur Walber cannot have been run over by tires that were burning rubber. He also stated that

Walber was hit in a "low impact collision" and did not make contact with the wheel of the vehicle. Significantly, Sam Scott never testified that the actual wheel of the vehicle impacted Walber's body or whether the impact was low or high impact.

However, on cross examination, Dr. Riddick admitted that the internal injuries inflicted on the body would depend upon which portion of the car passed over Walber's body. Dr. Riddick could not say what portion of the car hit Walber. In other words, the lack of injuries that Dr. Riddick claimed supported his opinion that Walber was not run over by the wheels of a car three times turned out to be irrelevant because Dr. Riddick could not say what portion of the car actually passed over Walber and, therefore, what injuries he could expect to see. When this testimony is viewed in conjunction with the State's trial evidence on these issues and the entirety of the testimony, one cannot say that the jury would have been persuaded to choose a different verdict or that this Court should not have confidence in the verdict rendered.

D. Police investigation

In this portion of his argument, petitioner alleges that the police made admissions in their post conviction relief depositions that they simply did not make. To bolster his claim that Corbit Ourso was ineffective for failing to properly cross examine the police, post conviction counsel called Thomas Streed as an expert if criminal investigations and police interrogations. Mr. Streed opined that the police did not meet the standards of care in their handling of this investigation. However, Mr. Streed's entire testimony is undermined because he based his opinion only on information provided by post conviction counsel; he did not review the entirety of the trial evidence, or the police files.

Significantly, Mr. Streed did not know who Melvin Tillman or Jeffery Ashton were or if they had testified at the trial. Mr. Streed also did not know whether Eric Charles Brown, Melvin

Tillmna, Robert Brewer corroborated Sam Scott's testimony. This is significant because their testimony did corroborate Scott. Mr. Streed also did not know who Ronnie Pinion and Charles Burise were or that they testified that Weary telephoned his father and stated he was a bystander and did not kill anyone. This is a significant failing by Mr. Streed and undermines his testimony and credibility.

Mr. Streed also admitted at the post conviction relief hearing that it was significant that Shadrick Reed named the same participants in the murder as Sam Scott. Mr. Street then inexplicably claimed this did not necessarily corroborate Scott. Mr. Streed also found it "bizarre' that according to Sam Scott, seven people were in Walber's car but no physical evidence was found. He admitted that this finding assumed the car was clean on the inside. The trial evidence shows that the car was not clean on the inside. Post conviction counsel claimed in a post hearing memorandum that Mr. Streed determined that the police had tunnel vision but failed to recall that Mr. Streed stated on cross examination that the police developed tunnel vision after the last interview with Sam Scott and then changed his testimony to state that he did not know when it developed. (See generally, Trans. 8-20-2012 pp. 22-72) In short, Mr. Streed's testimony was unconvincing and because he only looked at what the defense provided, his credibility is slight. Notably, Mr. Streed's testimony at the post conviction relief hearing has now been relegated to footnotes in petitioners' argument to this Court.

While Mr. Ourso may not have handled this case in the way that post conviction counsel would have handled it, that does not mean that petitioner meets his two pronged burden under *Strickland*. He must prove both that Ourso was ineffective and that this deprived him of a trial with a reliable result. Quite simply, the testimony and evidence on post conviction relief was not sufficient to cause any rational trier of fact to discredit the trial testimony of Jeffery Ashton, Eric Charles Brown. Melvin Tillman, Robert Brewer, Ronnie Pinion and Charles Burise.

In other words, this Court cannot say that the evidence presented on post conviction relief is sufficient to undermine confidence in this jury verdict. It cannot be said that this trial does not have a reliable result.

E. Alibi

Petitioner also wants this Court to believe that trial counsel was Constitutionally ineffective because he failed to investigate the so-called alibi. On this issue, the trial court stated in his Reasons for Judgment:

> In the instant application, defendant contends that, after a thorough investigation by his post-conviction relief team, numerous witnesses were discovered that could have offered testimony favorable to him at the trial. Defendant asserts that the failure to call those witnesses constituted ineffective assistance of counsel, and that, under the second prong of the *Strickland* analysis, this resulted in the defendant's having been deprived of a trial with reliable results.
>
> After thoroughly considering the testimony of the dozen or so witnesses called by the defendant on August 13-14, 2012, it is apparent that all witnesses, including those called, seem to agree that Mr. Weary did in fact attend the wedding reception; but their accounts are markedly inconsistent as to when Mr. Weary may have departed the reception. As such, based upon the additional testimony, a reasonable trier of fact could have concluded that Mr. Weary did, in fact, attend the reception. However, because the pivotal issue in establishment of a viable alibi defense was the time of Mr. Weary's departure, the additional testimony could not have produced a more favorable result to Mr. Weary than that effected by the three witnesses actually called at trial. Consequently, insofar as failing to call these witnesses has been alleged as a basis for the defendant's claim of ineffective assistance of counsel, such failure ultimately created no prejudice to Mr. Weary. (Appendix B-4)

Additionally, trial counsel's affidavit and post conviction relief testimony states that he and his investigator spoke with six potential alibi witnesses, four of whom testified at the trial although one testified on behalf of the State. Darlene Johnson, Kimberly Dominick Armstrong, and Renarda Dominick all testified that they were with Weary at the wedding reception and that Weary left around 9:00 or 9:30 pm. (Weary Trial Trans. pp. 2270, 2282, 2285) Johnson further testified that she did not like Weary and Armstrong testified that she and Weary did not get

along. (Weary Trial Trans. pp. 2275 and 2281) The new witnesses uncovered by post conviction counsel would have actually contradicted the testimony of the witnesses who both arrived and left the wedding reception with Weary. Such witnesses would only have undermined Weary's alibi, not strengthened it. Given this, the Louisiana courts' denial of post conviction relief cannot be said to be error.

CONCLUSION

The Rules of this Honorable Court do not support intervention in this case. United States Supreme Court Rule 10 informs on the exercise of this Honorable Court's discretionary jurisdiction in Petitions for Writ of Certiorari involving state court convictions. That Rule states that

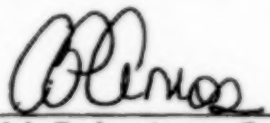
> A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: ...
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. *U.S. S.Ct. R. 10.*

Most importantly, however, that rule also states "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a

properly stated rule of law." *Id.* In the case before this Honorable Court today, there is no compelling reason for this Court to grant the petition for a writ of certiorari.

Wherefore, the Respondent prays that this Honorable Court deny the petitioner for writ of certiorari.

Respectfully submitted,



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No. 14-10008

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL WEARRY,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Introduction

The State has no case against Mr. Wearry without Sam Scott. Until he came forward, the case was cold. He is their only purported eyewitness to the murder of Eric Walber.

At the post-conviction evidentiary hearing, Lakendrick Scott and his wife, Doris Dantzler-Scott, testified. Lakendrick is Sam Scott's brother. Lakendrick has a clear memory of April 4, 1998, the day of the murder. It was his mother and uncle's birthday, and he and Sam went to their joint birthday party. They arrived together at 10:00 or 11:00 a.m., and stayed until 5:00 or 5:30 p.m. Lakendrick and Sam left the party together. They drove together to Sam's girlfriend's house, where they showered and changed clothes. They left Sam's girlfriend's house together and went to the Strawberry Festival. Lakendrick remembered where they parked. Around 15 to 20 minutes after they arrived

at the Strawberry Festival, Lakendrick and Sam met up with some friends, including co-defendants Shadrick Reed and Darrell Hampton. Then Doris Dantzler and her friend, Shyllorie Ard, met up with them all. Lakendrick remembered staying at the Strawberry Festival until it was time to pick up Sam's girlfriend from work, around 10:00 or 11:00 p.m. Lakendrick was asked at the evidentiary hearing:

> *Q. From the time you got to the Strawberry Festival until you left to pick up Sam Scott's girlfriend, was Sam Scott with you?*
>
> *A. Yes, the whole time.*

August 2012 Tr., p. 26: 5 – 8. And when they did leave, Lakendrick Scott again rode with Sam Scott. After Sam Scott's girlfriend got off work, the three of them drove around, smoked some marijuana and dropped off Lakendrick at his mother's house about 11 p.m. Lakendrick Scott went on to testify that he was never contacted by the local police or an investigator.

Doris Dantzler-Scott testified she knew Lakendrick and Sam Scott in April 1998. She specifically recalled being at the Strawberry Festival on April 4th, 1998, because that was when she and Lakendrick had planned to meet up for their first date. She met him about 7 p.m. that Saturday night. Lakendrick was with Sam Scott and two or three more guys that she did not know. She recalled hanging out with Lakendrick and Sam Scott. During the State's cross examination, Ms. Dantzler-Scott was asked:

> *Q. And you were able to remember that evening on your own?*
>
> *A. Yes, sir.*
>
> *Q. Any reason why? Did it stand out as being a big event 14 years ago?*
>
> *A. That was ... our first official date meeting up at the Strawberry Festival.*
>
> *Q. How did you know it was the Saturday evening of the Strawberry Festival?*

A. Because it was also his mother's birthday.

August 2012 Tr., p. 44: 20 – 29. Trial counsel never talked to Lakendrick or Doris, and the jury never heard from them due to trial counsel's ineffectiveness. Despite the major inconsistencies in Sam Scott's statements suggesting that he was not an eyewitness, trial counsel made no effort to investigate Scott's story.

The State's Brief in Opposition has only a pejorative in response to this detailed testimony: "No rational jury would disregard all of [the trial] evidence in favor of Lakendrick's and Doris' inconsistent testimony." *Respondent's Brief* at 25. But what if the jury had learned that investigators, while navigating Sam Scott's wildly inconsistent statements, provided him with material facts about the murder? What if the jury had heard from the alibi witnesses presented by post-conviction counsel? Or heard from orthopedic surgeon Dr. Dworak and forensic pathologist Dr. Riddick, who were both convinced that Sam Scott's story could not be true? A jury could have heard these things had there been no *Brady* violations. A jury could have heard these things had trial counsel not been uniformly deficient. And if a rational jury had heard these things, it probably would have disregarded Sam Scott's testimony.

I. Respondent Mischaracterizes the Controlling Law of this Court

Respondent repeatedly mischaracterizes the applicable law of the Court set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), *Strickland v. Washington*, 466 U.S. 668 (1984), and their progeny. And Respondent fails to address trial counsel's deficient performance as part of its *Strickland* analysis, so Respondent has conceded this point.

A. Under this Court's *Brady* Doctrine, Materiality is Assessed Cumulatively

In addressing Petitioner's *Brady* issue, Respondent asserts that "[t]he information cannot be considered material under this Honorable Court's definition of materiality and petitioner did not show that, in conjunction with the trial evidence . . . the information would have changed the outcome of this trial." *Respondent's Brief* at 13. But Respondent responds to Petitioner's *Brady* evidence item by item, in direct contravention of this Court's precedent. Rather than analyzing the cumulative effect of the undisclosed evidence, Respondent discounts the effect that each piece of evidence would have had on the jury in light of the trial evidence. *See, e.g., Respondent's Brief* at 16 ("In order to believe Dr. Dworak's ultimate opinion that Hutchinson couldn't walk or bend his knee, the jury would have had to disregard all the other evidence presented at the trial."); *see also Respondent's Brief* at 22 ("[P]etitioner cannot and did not show that use of this information [Rene Helm's statement to the police] would have led to a different outcome in his trial.").

This Court has long-mandated that the materiality of undisclosed impeachment and exculpatory evidence be analyzed collectively. *See Bagley v. United States*, 473 U.S. 667, 683, 105 S. Ct. 3375, 3384 (1985); *see also Kyles v. Whitley*, 514 U.S. 419, 436, 115 S. Ct. 1555, 1567 (1995). In *Bagley*, this Court held that a reviewing court should assess materiality "in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." *Bagley*, 473 U.S. at 683. A decade later, in *Kyles*, this Court explicitly directed that "[t]he fourth and final aspect of *Bagley* materiality to be stressed here is its definition

in terms of suppressed evidence considered collectively, not item by item." *Kyles*, 514 U.S. at 436. Respondent's brief fails to follow this clear directive.

As a corollary issue, Respondent mischaracterizes the legal standard applicable to Petitioner's claim that the State failed to disclose that jailhouse informant Eric Charles Brown requested favorable treatment from both law enforcement and the District Attorney. In its brief, Respondent alleges that "[t]he fact that Brown may have sought consideration is irrelevant under the law" and that "the question is whether the witness believed he had been promised or was likely to receive some consideration for his testimony," suggesting that Brown's request for consideration cannot even be considered *Brady* evidence. *Respondent's Brief* at 17. Respondent makes a distinction without a difference. Whether there is proof that Brown actually obtained favorable treatment is beside the point. First, the suppressed documents remain inconsistent with what the prosecution told the jury, that not only did Eric Charles Brown not have a deal, he didn't want one, didn't need one, and came forward out of altruism. *See Giglio v. United States*, 405 U.S. 150, 155, 92 S. Ct. 763, 766 (1972) ("[E]vidence of any understanding or agreement as to a future prosecution would be relevant to [a witness's] credibility and the jury was entitled to know of it.").

Second, this Court has made clear that *Brady* material includes evidence showing a desire to get a deal, even where a formal deal is never reached. In *Bagley v. United States*, 473 U.S. 667, 683-684, 105 S. Ct. 3375, 3384 (1985), the prosecution offered two of its witnesses the "possibility of a reward", which provided "a direct, personal stake in respondent's conviction. The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a

conviction." As this Court has explained, the key question is not whether a formal agreement existed between the witness and the State but whether the witness "might have believed that [the state] was in a position to implement . . . any promise of consideration." *Napue v. Illinois*, 360 U.S. 264, 270, 79 S. Ct. 1173, 1177 (1959).

B. *Strickland* Prejudice, as Established by this Court's Precedent, is Assessed in Light of the Totality of Trial Counsel's Errors

Respondent similarly misapplies the *Strickland* prejudice standard in evaluating trial counsel's errors in isolation. *See, e.g., Respondent's Brief* at 25 ("No rational jury would disregard all of that [trial] evidence in favor or [sic] Lakendrick and Doris' inconsistent testimony and therefore, the post-conviction hearing evidence cannot be said to undermine confidence in the jury's verdict"). This Court has directed that the errors of trial counsel, which form the grounds for ineffective assistance of counsel claims, be viewed as a whole rather than in isolation.[1] *See Strickland v. Washington*, 466 U.S. 668, 695, 104 S. Ct. 2052, 2068-2069 (1984) ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, *absent the errors*, the factfinder would have had a reasonable doubt respecting guilt.") (emphasis added); *see also Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S. Ct. 1495, 1515 (2000) ("[T]he State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation.") (internal

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[1] This Court recognizes a prejudice standard under *Strickland* that is identical to the *Brady* materiality standard articulated in *Bagley*. *See Bagley v. United States*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985) ("We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover . . . cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

citations omitted). In reversing the circuit court's denial of Petitioner's penalty phase claim of ineffectiveness in *Rompilla v. Beard*, 545 U.S. 374, 393, 125 S. Ct. 2456, 2469 (2005), this Court found:

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] culpability," and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing.

Id. (internal citations omitted). Time and again, this Court has emphasized that the prejudice inquiry is a global one: in *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 2542 (2003) (emphasis added), another case involving a claim of penalty phase ineffectiveness, this Court stated that "[i]n assessing prejudice, we reweigh the evidence in aggravation *against the totality of available mitigating evidence*." Here, Respondent simply does not do this.

II. Conclusion

After Petitioner was indicted in Livingston Parish (in which African Americans make up about 3-4% of the population), instead of in Tangipahoa Parish where Eric Walber's body was found (roughly 35% African American), Petitioner faced an all-white jury in a highly charged capital case with no physical evidence where the State's case was based on the materially variable accounts of jailhouse informant, Sam Scott. The undisputed testimony of the investigating officer, Murphy Martin, in a deposition conducted by post-conviction counsel, was that he provided material facts about the crime to Sam Scott. The undisputed testimony of other investigating officers and the former Chief of Detectives, Kearney Foster, at the post-conviction evidentiary hearing was that it

is wrong to give material facts to a witness. Petitioner's post-conviction forensic pathologist, Dr. Riddick, was clear at the post-conviction evidentiary hearing that Sam Scott's trial testimony that Eric Walber was run over three times (a claim used as an aggravating circumstance by the State) was not true; Mr. Walber was not run over more than once. Orthopedic surgeon Dr. Dworak was also clear at the evidentiary hearing that Randy Hutchinson's activity as described by Sam Scott would have fully disrupted his patellar tendon repair, and if fully disrupted, Hutchinson would not have been able to walk. Hoping to distract from these facts, Respondent resorts to hyperbole. No matter how often Respondent uses pejoratives like, "completely mischaracterizing trial testimony," "such a conclusion is absurd," "so-called alibi," or varied themes, these facts are what they are. As John Adams noted: "Facts are stubborn things; and whatever may be our wishes, they cannot alter the state of the facts of the evidence."

Respectfully submitted,

Dated: September 8, 2015

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MICHAEL WEARRY

No. 14-10008

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL WEARRY,

Petitioner,

vs.

BURL CAIN, Warden Louisiana State Penitentiary,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

CERTIFICATE OF SERVICE

I hereby certify that Petitioner's *Reply to Respondent's Opposition to Petition for Writ of Certiorari* was served via regular U.S. Mail, on this 8th day of September, 2015 upon Patricia Parker Amos, Assistant District Attorney for the Livingston Parish District Attorney's Office, P.O. Drawer 639, Amite, LA 70422. All persons required to be served have been served.

Dated: September 8, 2015

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September 8, 2015

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U.S. Supreme Court
1 First Street, NE
Washington D.C. 20543

Re: *Michael Weary v. Burl Cain, Warden*
Docket No. 01-FELN-015992
USSC No.: 14-10008

VIA CERTIFIED MAIL

Dear Clerk:

Please find enclosed petitioner's *Reply to Respondent's Opposition to Petition for Writ of Certiorari to the Louisiana Supreme Court* that we ask that you place on your docket.

I have enclosed an original, 10 copies for filing and an extra copy to be stamped and mailed back to us in the enclosed self-addressed stamped envelope.

Thank you for your attention to this matter.

Sincerely,

Denise Nicholl

Denise Nicholl
Paralegal

Enclosure

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